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T H E

LAW of TESTAMENTS

A N D

LAST WILLS:

CONTAINING

What is necessary to be known by Testators, their Executors, Administrators, &c. also what relates to the Distribution of Intestates Estates.

What Persons are or are not capable of making a Testament; how Lands pass by Will, Nature of Devises and of Legacies to charitable Uses, &c. The Customs of London, &c.

What Things the Executor, and what the Heir shall have of the *Bona Paraphernalia*, Cloaths, Ornaments, &c. Of Assets, and what Debts to be paid first: To whom Administration shall be granted, their Power, &c.

Who shall be an Executor of his own Wrong: How far liable to Creditors and Legatees, &c.

COMPILED BY
ROBERT RICHARDSON, Gent.

Author of the ATTORNEY'S PRACTICE, Four Volumes.

The SECOND EDITION, with IMPROVEMENTS.

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THE
PREFACE.

THERE is no branch of the Law, which is more necessary to be explained to the publick, and in which the generality of mankind is more frequently concerned, than in that which relates to last wills and testaments: Since every man, and even woman, at one time or other of their lives, are liable to act in it, either as testator, executor, administrator, legatee, or next-of-kin to some deceased person.

And this part of knowledge in the law, concerning wills, executorships, &c. is still more necessary, as too frequently, either through dilatoriness, un-

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reasonable pusillanimity, sudden illness, variation in circumstances, whether by new acquisitions, or unexpected losses, changes in families, or other means, it happens, that the making of a will is left to be the work of a man's *last hours*; when he can seldom have that assistance to make a proper disposition of his effects, which in health he would have sought, and easily might have obtained.

At such a time, the want of knowing the nature of a testament, the power of a testator over his property, the proper manner of disposing of it, and the method of executing a will, or by what means a former will may be revoked, has often proved fatal to families. A spendthrift heir or an undeserving wife, has frequently carried away the greatest part of the deceased's property, and left the younger children helpless, and perhaps intirely unprovided for; and a fortune which has been gained by industry, and frugality, with a view of providing for those very children, which have been thus left at the mercy of the unworthy, has

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has been squandered away in luxury and riot.

It is moreover necessary for a person to know how the law will dispose of his estate in case he should make *no will*. For, although it is not our intent, to make people indifferent in relation to an act so necessary to be set about, and that in good health and spirits, while a person knows what he does, and how to act in so arduous an affair, as is that of discreetly disposing of what it has been the business of his whole life, to get together, for the sake, usually, of those who come after him; yet it must be confessed, that, generally speaking, the law makes a better will for the deceased, than he would perhaps have made for himself, had he drove it off to his last hours; which is too often done, as we have observed above. For the law, in case of an intestate, makes such a will for him, as it supposes every good man, in perfect harmony with his family would have made: And it is often best, for this reason, for the peace and good of a family, that a man, when he finds

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he has not time, or an honest practiser, or friend at hand, to consult with, to leave his fortune to the distribution the law will make: Unless in some particular cases; as, where there are infants, or persons of weak capacities, to be provided for; spendthrifts or prodigals to be curbed; or large fortunes are left, which it may be necessary to limit over to others upon contingencies.

The *executor* and *administrator* stand in no less need of assistance in the execution of their offices. There is no branch of our law that calls upon the legislature for amendment, more than that which relates to executors and administrators. A knavish executor or administrator can, in many cases, cheat with impunity; whilst an honest one is scarcely ever safe: Is it not then highly requisite, that all such should be acquainted with what the law directs, in a point that so much concerns them to know? There are many things necessary for their knowledge both before and after their taking those offices upon them: As, for instance, how far, in particular

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particular cases, it is advisable for them to do it : What will be the consequences of it : What property they have in the estate of the deceased, and how they are to apply and distribute the same. The advice of a court of equity in such cases, is often too expensive for a moderate fortune to bear.

Though it may be thought a piece of presumption to offer this treatise to the perusal of the *learned* of the profession of the *law*, yet we have good reason to say, that, for many years, there has not been published a book of more use to practisers *in general*. For the matters here treated of, are those which are now most in use; every thing is grounded upon the best authorities; which are likewise quoted. Many cases are also inserted, which were never in print before; and the whole is so adapted and connected together, that one case serves to illustrate and strengthen another, or evidently shews the reason for its difference. So that, not only the law itself, as far as the subject will admit, but the reason of it, which is the very life of the law,

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is shewn in a clear and conspicuous light.

We shall only add, that this work was compiled by a gentleman solely for his own private instruction, and was not designed by him to be published. But having owned that he found it a great help to himself in practice, he could not, on being urged, deny its being made publick, for the sake of others, who might be equally benefited by it.

Who the gentleman is, can be of no use to the reader to know; although it might very probably have been of service to the proprietor of the work, had he been permitted to affix his name.

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THE

THE LAST WILL

TESTAMENTS and LAST WILLS, EXECUTORS and ADMINISTRA- TORS, and the Distribution of IN- TESTATES Estates;

CHAP. I.

*Of Testaments, Last Wills and Codicils—Of
written Testaments of Goods and Chattels—
Of Witnesses to them—Of last Wills devis-
ing Lands—How to be executed pursuant to
the Statute of Frauds—Of Nuncupative Tes-
taments, when good by the Statute of Frauds—
How to be executed and proved.*

THOUGH at first it may seem that a testament and a last will are one and the same thing, yet, upon a nearer view, they will be found in some respects to differ; they have different names and different definitions. If we consider the bare signification of the word testament, which is as much as *testatio mentis*, we shall not find any difference between a testament and a last will; for every kind of last will, be it by codicil or

Of the difference between a testa-
ment and last
will. See a Burn's
Eccl. law 504.

B

otherwise

Testaments, Last Wills, and Executors.

otherwise, may be so termed a testament: But if the word testament be taken in a stricter sense, it differs from a last will as the *special* differs from the *general*; every testament is a last will, but every last will is not a testament. A last will is a general word, and agreeth with every kind of last will or testament. A testament is properly that kind of last will wherein an executor is named; for by the naming of an executor it differeth from the rest. (*Testament sans executour est come nul. Plowd. 185. a.*) If a man makes a last will without appointing an executor, he is said to die intestate; but in such case the will of such intestate is always annexed to the letters of administration as a direction to the administrator; as it is where an executor is appointed, but refuses to prove the will and take the executorship upon him. In law most commonly *ultima voluntas in scriptis* is used where lands or tenements are devised, and *testamentum* when it concerneth only chattels; for an executor hath nothing to do with a devise of lands or tenements. A codicil is a diminutive from the word *codex*, a book, and signifieth a little book or writing; it is a schedule or supplement to a testament or last will: A codicil can no more admit of an executor, than a testament can consist or be without one: A testament is called a great will, and a codicil a little one: A codicil is used as an emendation or addition to the testament; as when any thing is omitted in the testament, which the testator would add, or something put in, which the testator would, upon further consideration, detract: A codicil may be made as well by him that dies intestate, as by him that dies leaving a testament. No man can die with two testaments (because the latter does always infringe the former); but a man may die with diverse codicils, and the latter doth not hinder the former, unless they be contrary. If two testaments be found, and it does not appear which

Of a codicil.

Difference between a codicil and testament.

Testaments, Last Wills, and Executors.

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which is the former or latter, both are void: But if two codicils are found, and it cannot be known which was the first, and which the latter, and one thing is given to one person in the one codicil, and the same thing is given to another person in the other codicil, the codicils are not void but the persons therein named ought to divide the thing between them. A testament is defined thus:

Definition of a testament.

Testamentum est voluntatis nostræ iuxta sententia de eo quod quis post mortem suam fieri voluit. A last

Of a last will.

will is defined in this manner: *Ultima voluntas est legitima dispositio de eo quod quis post mortem fieri velit.* And the definition of a codicil is this: *Codi-*

Of a codicil.

cillus est voluntatis nostræ iuxta sententia de eo quod quis post mortem suam fieri velit, absq; executoris constitutione. For a full explanation of these several definitions, see Swinh. Part 1. sect. 2, 3, 4, 5.

Of Testaments in Writing.

A Testament in writing is that, which at the time of the making thereof, is committed to writing: By which words, at the time of the making thereof, are excluded such testaments as are afterwards put into writing; for being made first by word of mouth, they still remain nuncupative, notwithstanding the reducing them into writing: Unless the testament being first made by word, and afterwards, in the life-time of the testator, be written and brought to the testator, and by him approved of for his testament: Or unless the testator when he declared his testament, did will that the same should be written, and the same was accordingly written during his life. In a written testament, the testator may conceal the tenor or contents of his will from the witnesses; which he cannot do when he maketh a nuncupative testament. To a written testament, bequeathing

Of written testaments.

Of two witnesses to a written will of chattels only.

Testaments, Last Wills, and Executors.

What shall be
proof of such a
will.

ent, but it is proper that the witnesses should subscribe their names as witnesses to the same. If the testator affirms that his will is already written, and is in the custody of such a one, naming some particular person, which person doth bring forth a writing, and depose upon oath that that is the writing which the testator affirmed unto him was his last will and testament, this man's testimony, together with the other witnesses deposing that the testator affirmed that his will was in that man's custody, is a sufficient proof of the will of the deceased: But if the testator did not only affirm that his will was in that man's custody, but also that the same was written with his own hand, then it is not sufficient for the proof thereof, that the man who produces the will, does depose that it is the same which the testator committed to his custody, but it must also be proved that the same was written with the testator's own hand: for the testator, in affirming that the testament was written with his own hand, intimated, that unless it appeared to be written with his own hand the other man's testimony should not suffice. If it be certain and undoubted that the testament is written or subscribed with the testator's own hand, in this case the testimony of witnesses is not necessary. But if it be doubtful whether the testament were written or subscribed by the testator, in this case the testimony of witnesses is necessary to confirm the same to be the testator's own hand. But it is not enough for the witnesses to say that this is the testator's own hand, for we know his hand; neither is it sufficient (in the opinion of many) to bring forth other writings of the known hand of the testator, and so prove the will to be written or subscribed by the testator, by comparing such writings with the testament; for the witnesses may be deceived (the testator's hand being easy to be counterfeited) and therefore proof by similitude of hands is not full proof, except in such

When witnesses
to a written testa-
ment of goods or
chattels not
necessary. Wil.
Rep. 13. in notes
S. P.
Swinb 65, 66.
See Swinb. 306.

such courts where custom doth allow such testimony for full proof, or when the testament is to be proved in vulgar form: Nevertheless, in this case where it is doubtful whether the testator did write or subscribe the testament, if the witnesses do depose that they saw the testator write or subscribe the testament, and knew the same to be his hand; or that they did hear the testator confess that he had made his testament, or that the same was in the hands of such a person, or if the testament be found in the testator's chest amongst his other writings: In these cases, the proof made by comparison of hands, although the testament be to be proved in full form, is a full and sufficient proof: Or if there be none of these helps by likely circumstances, yet if on the contrary there be no suspicion of fraud, or fear of subornation, it is the better opinion that proof made by comparison of hands may be allowed: But then also the writing found in the testator's chest, must be so written, as it may appear not to be a draught or preparation of a will, but the will itself. If the testator acknowledges that his testament is contained in a schedule or writing which he left in the custody of such a man; if that man brings forth the schedule, and upon his oath depose that to be the same writing which the testator left in his custody: This is sufficient proof without comparing of hands. If the testament be found in the testator's chest, or safely kept amongst other writings, which testament is neither written nor subscribed by the testator, but altogether of another man's hand, this shall not prevail as the last will and testament of the deceased, unless it be proved that the same was written by the commandment of the testator.

There were only three witnesses to a will of a personal estate, and two of them happened to be children of the residuary legatee. *Dr. Watkinson*, chancellor of the archbishoprick of *York*, gave sentence for the validity and probate of this will, from

To a will of a personal estate three witnesses, two of them children of the residuary legatee. They were not allowed to be

witnesses, and the
Will failed for
want of proof.

from which there was an appeal brought before the court of delegates. It was insisted, that those two children were not competent witnesses; for as much as by the civil law the child was not allowed to be a witness for his parent. *Digest. Tit. de testibus. Albericus Gentilis* in his tract *de testibus*, qu. 2. fol. 230. It was answered, that there was one witness without exception, and that by the civil law one good witness might supply the deficiency of another exceptionable witness, *Parnicius de testibus*, q. 62. fol. 199. It was replied, that in this case the having one good witness would not help the disability of the rest; for that was to be understood where the exception went only to diminish in part the credit of the witness, as on account of friendship, or even relation, in a further degree; but not in case of exception to a child, who was absolutely prohibited to be any witness at all; and lastly, (as the strongest argument in favour of the exception) the constant practice was appealed to, and that the defect could not be supplied, was said to appear from *Swinburn*, who giving an account of the practice and law here in that particular, *Lib. 4. sect. 24. (q. sect. 21.)* expressly says, when the law resists the examination of witnesses, it shall not be supplied by any other witness. Whereupon it was agreed, that these two children were not to be allowed as witnesses: Therefore the will failed for want of proof; one witness being by the civil law as no witness. *Mich. Vac. 1696. Twaites and Smith, Wil. Rep. 10. L. Raym. 91. 8 Vin. Abr. 131. (N. 13.) pl. 3. See Stat. 25 Geo. 2. c. 6.*

One of the subscribers to the attestation of a will had an interest under it, and held not to be a credible witness within the statute.

Where a testator by his will devised lands, and gave to the wife of *John Hailes* an annuity of 20 l. a year to her sole and separate use; and to *John Hailes* and his wife each of them a legacy of 10 l. and charged his whole real and personal estate with the payment of all his legacies and annuity. *John Hailes* was one of the subscribing witnesses

to

to this will. The legacies and satisfaction for the annuity were tendered and refused; and the question now was, on a special verdict, whether this will was good and well attested within the statute of frauds and perjuries? The court were of opinion, that the will was not properly attested, as *Hailes* was interested, and therefore not a credible witness; and gave judgment for the plaintiff, the testator's heir at law. *Ansty v Dowling*, *Bur.* 425. 2 *Burn's Eccl. Law*. 529, 535. *L. G. J. Camden's Arg. Har. Justin.* 49, 50. *Tri. at Ni. Pri.* 249, 250. 5 *Bac. Abr.* 519.

It has been said, that the judgment of the court was in that case founded upon the particular circumstances of the case, and not on any general doctrine, as there was not, nor could be any payment or tender made of the annuity given by the will in that case to the wife of the witness; and the general doctrine laid down by lord chief justice *Lee* has been since denied by the court of *K. B.* in the case of *Windham v. Chetwynd*. *Tri. at Ni. Pri.* 250. *Bur. Rep.* 414. 2 *Burn's Eccl. Law* 531.

The case of *Windham v. Chetwynd*, is very accurately reported both by Mr. *Burrows* and Dr. *Burn*, wherein the judgment of the court thereon, as delivered by lord *Mansfield*, is stated in a very full and perspicuous manner: In this judgment is explained what is to be understood by the words *credible* and *competent*; and after entering very largely into the law respecting attestations, it is determined that a benefit given to a subscribing witness should not annul his attestation, and make the will void, as at the time of his subscribing, if at or after the testator's death the witness be disinterested, and *competent* to be examined in support of the will. 5 *Bac. Abr.* 544.

To prevent the inconveniences which would have arisen from the above opinion given in *Ansty* and *Dowling*, in case it had been followed, as

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There are few wills in which the witnesses have not had legacies or debts charged upon land, the *Stat. 25 Geo. 2. c. 6.* was made, whereby *sect. 1.* "If any person attest the execution of any will or codicil, made after the twenty-fourth of *June 1752*, to whom any beneficial devise, legacy, estate, interest, gift or appointment of, or affecting any real or personal estate, except charges on lands or hereditaments for payment of debts, is thereby given or made, such devise, &c. shall so far only as concerns such person attesting such will or codicil, or any person claiming under him, be void; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of *29 Car. 2. c. 3.*"

Devisee a witness,
but the devise
void.

By *sect. 2.* "In case by any will or codicil made, or hereafter to be made, any lands or hereditaments be charged with any debts, and any creditor, whose debt is so charged, hath attested, or shall attest the execution of such will or codicil, every such creditor shall be admitted as a witness to the execution of such will or codicil."

Creditor a witness.

By *sect. 3.* "If any person hath attested the execution of any will or codicil to be made on or before the said twenty-fourth of *June 1752*. to whom any legacy is thereby given, and such person, before he give his testimony concerning the execution of any such will or codicil, be paid or have released, or refused such legacy upon tender thereof; such person shall be admitted as a witness to the execution of such will or codicil."

Legatee paid, or
refusing, a witness
before the
twenty-fourth
June 1752.

By *sect. 5.* "In case any such legatee, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil to be made on or before the twenty-fourth of *June 1752*. shall have died in the life of the testator, or before he have received, or released or refused such legacy on tender, such legatee shall

Legatee attesting,
and dying a
witness.

Testaments, Last Wills, and Executors.

9

shall be deemed a legal witness to the execution of such will or codicil, within the 29 *Car.* 2. c. 3.

By *sect.* 6. "The credit of every such witness so attesting the execution of any will or codicil, and all circumstances relating thereto, shall be subject to the consideration of the court and jury, before whom such witness is examined, or his testimony or attestation made use of; or of the court of equity in which his testimony or attestation is made use of."

Credit of the witness to be considered.

2. If the will in question appeared to be written, or so much as subscribed by the testator; since in either of these cases it would have been good without any witness at all. *Wil. Rep.* 13. *Swinb.* 65; 66. See *Swinb.* 300.

By the common law before the statute 32 *H.* 8. c. 1. no lands or tenements (except by particular custom) were devisable by any last will or testament. *Co. Lit.* 111. b.

Of last wills, whereby lands and tenements are devised.

By the statute of frauds and perjuries, 29 *Car.* 2. c. 3. *sect.* 5. all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void, and of no effect. *sect.* 12. And any estate *pur autre vie*, shall be deviseable by a will in writing, signed by the party so devising the same, or by some person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses.

To be in writing.

How to be executed and attested.

Estate *pur autre vie* deviseable.

By *stat.* 14 *Geo.* 2. c. 20. *sect.* 9. Estates *pur autre vie*, in case there be no special occupant thereof, of which

Estates *pur autre vie* to be distinguished.

Testaments, Last Wills, and Executors.

which no devise shall have been made according to 29 *Car.* 2. c. 3. or so much thereof as shall not have been so devised, shall be distributed in the same manner as the personal estate of the testator or intestate.

The witnesses
attesting a will
at several times.

If a will be attested by three witnesses, who severally signed their names, though not being present together; yet the signing being in the presence of the testator it is a good will within the statute. 2 *Chan. Ca.* 109. It is not said in the act, that the signing shall be in the presence of the three witnesses at the same time. 3 *Mod.* 219.

Two witnesses to
the will, and another
to a codicil,
not a good will
as to lands.

But where a man made a will, and subscribed and published it in the presence of two witnesses, and they subscribed it in his presence; and after he made a codicil in writing, reciting that he had made a former will, and confirmed the same, (except what was excepted by the codicil) and declared that the codicil should be taken as part of his will, and published it in the presence of one of the same and another witness: This was held not to be a good will, for there were not three subscribing witnesses in the presence of the testator, and one of the witnesses to the codicil never saw the will: Though it was objected that the will and the codicil made but one will, and the circumstance of three witnesses wanting to complete the will, was supplied by the codicil. Between *Lex* and *Lib.* 3 *Mod.* 262.

Will wrote on
several papers
when bad.

A man made a will on several pieces of paper, and there were three witnesses to the last paper, but none of them ever saw the first: This is not a good will. 3 *Mod.* 263.

Witnesses sub-
scribe in another
room.

The testator desired the witnesses to go into another room seven yards distant, to attest his will, in which room there was a window broken, through which the testator might see them; and it was held that this will was good according to the statute 29 *Car.* 2. For though the statute requires

requires attesting in his presence, to prevent obtruding another will in the place of the true one; yet it is enough if the testator might see; it is not necessary that he should actually see them signing; for at that rate, if a man should but turn his back, or look off, it would vitiate the will; and here the signing was in the view of the testator, and he might have seen it, and that is enough: So if he being sick should be in bed, and the curtain drawn, *Between Shires and Glascock, 2 Salk. 688.*

If the testator writes his will with his own hand, though he does not subscribe his name, but seals and publishes it, and three witnesses subscribe their names in his presence, it is a good will; for his name being wrote in the will, it is a sufficient signing, and the statute does not direct whether it shall be at top, bottom, &c. *Between Lemayne and Stanley, 3 Lev. 1.* Of the testator's signing.

It was held by lord *Roymond*, Ch. J. King's Bench, on an issue directed out of *Chancery*, *devisavit vel non?* that sealing a will was signing it, within the statute of frauds and perjuries *Warnesford v. Warnesford, 2 Stra. 764.*

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign, and it is observable that the statute of frauds does not say, the testator shall sign his will in the presence of three witnesses, but requires these three things, first, that the will should be in writing. Secondly, that it should be signed by the testator. And thirdly, it should be subscribed by three witnesses in the presence of the testator. *Stonehouse & Un. v Evelyn, 3 Will. Rep. 254. 5 Bac. Abr. 508.*

Nevertheless a will has been held to have been well executed, though it was not mentioned in the attestation to have been signed in the presence of

of the testator. *Crofts v. Powlet*, 2 *Str.* 1109. 5 *Bac. Abr.* 508.

It was determined by Lord Chancellor, that a will is well proved, though the witnesses did not see the testator sign his name; if he declared it to be his hand writing to them, and they attested it in his presence, and in the presence of each other. *Grayson v.* — 5 *Bac. Abr.* 509.

A will of lands was originally executed in the presence of two witnesses only; and at the distance of four years afterward, the testator re-executed his will, by drawing a pen on the old strokes, in the presence of one other person, who likewise subscribed his name as a witness to it. Upon an ejectment, brought by the heir at law, and on a special verdict, it was determined by the court, that this will was properly executed, and attested, under the statute of frauds and perjuries. *Jones v. Dale*, 5 *Bac. Abr.* 509.

A will was attested by three witnesses, in the presence of the testator and of each other, but the testator did not write his name or put his seal in their presence, but pointed to the paper, and said that was his will, and he had wrote it, and that his name *William Ellis* subscribed, was his writing and name; and laid his hand on the seal, and said, that was his seal. Determined by lord *Hardwicke*, assisted by lord chief justice *Willes*, *Strange*, master of the *Rolls*, and the chief baron, on a question in this cause, whether this will so executed, was good as a revocation of a former will, under the sixth section of the statute of frauds? and held clearly that it was; it not being doubted but that it was good as an original will, according to the authorities determined on this head, that the owning it to be his hand writing was sufficient. *Ellis v. Smith*. 5 *Bac. Abr.* 509.

But if the witnesses subscribe their names to the will, in a room adjoining to that where the testa-

tor lay, but out of his sight, so as he could not see them subscribe their names; this is no good will within the statute to pass lands, because the witnesses in that case did not subscribe their names in the testator's presence. *Gilb.* 93. 2 *Burn's Eccl. Law* 522.

On a trial at bar in ejectment, the defendant made title under a will, the attestation of which was in these words, "signed, sealed, published and declared as and for his last will, in the presence of us *A. B. and C.*" The will was in 1723, and the witnesses all dead, and their hands proved in common form: but then it was objected, that this was not an execution according to the statute of *Frauds*; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of a (*) ^{1* Com. Rep.} case in *C. B.* said it was evidence, to be left to a jury, of a compliance with all circumstances. And a verdict was given for the will. *Croft v. Pawlet*, 8 *Vin. Abr.* 128. pl. 4. 2. *Stra.* 1109.

In an ejectment brought by the plaintiff as heir at law, the question was on a case by consent left to the opinion of the court, whether it shall be left to a jury to determine, whether the witnesses to a will (being all dead) did set their names in the presence of the testator, and this merely upon circumstances, without any positive proof. By the court; This is a matter fit to be left to the jury. The witnesses by the statute ought to set their names as witnesses, in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved: If inserted, it doth not conclude, but that the contrary may be proved. And if not conclusive, when inserted; the omission thereof shall not conclude that it was not so; and therefore it must be proved, by the best proof that the nature of the thing

thing will admit of. *Hands and James, Com. Rep. 531. pl. 218.*

It was held clearly by lord *Hardwicke*, that a will of a copyhold tenant, attested by one or two witnesses, or even without any witnesses at all, is sufficient to declare the uses of a surrender which he has made; and the reason, is because the party is in by the surrender, and not by the will. *Tuffnell and Page. 2 Atk. Rep. 37. pl. 24. 2 Wil. Rep. 261. Barnard. Chanc. 11, 12.*

Although witnesses to prove the will may be necessary, yet it doth not seem to be of absolute necessity that the names of these witnesses should be by them subscribed to the will. *2 Burn's Eccl. Law 424.*

So in a case where the testator gave instructions to make his will of his real and personal estate; and when it was brought to him, he made several alterations, and then wrote the whole over as altered with his own hand: this, being found in his study, though not signed or sealed, was held a good will (as to the personal estate). It is true, the first sentence was that he died intestate; but that was reversed by the delegates. *Lunbrey & al. and Hyde. Com. Rep. 453. pl. 207.*

Whether it is necessary that the testator should declare to the witnesses, at the time of the attestation, that the writing which they attest is his will, hath been matter of some doubt; as in the case of *Wallis and Wallis, T. 1762. Thomas Wallis Esq;* made his will, and therein devised his real estate to his wife for life, the will was of his own hand-writing; and the form of attestation was in these words, *signed, sealed published, and declared for the last will and testament of the said Thomas Wallis in the presence of us, &c. Isabella Mathews, James Wardell, William Powell.* The heir at law brought an ejectment. The widow pleaded the devise to her for life. The cause came

came on to be heard at the summer assizes at *Lincoln*, 1762, by a special jury before Mr. justice *Denison*. To prove the execution of the will, the defendant produced *William Powell*, the testator's coachman, one of the three subscribing witnesses, who deposed, that in the beginning of *July* 1760, *James Wardell*, then butler to the said *Thomas Wallis*, came and told him the said *Powell* that he was to come to his master; that upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him, and the said *Wardell*, and one *Isabella Matthews* then his house-keeper, up to the table to him; where they all came. Then the said *Thomas Wallis*, further addressing himself to them all, desired them to take notice; and then took a pen and in all their presence signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto; which they all did, by the directions of the said *Thomas Wallis*, in his presence, and in the presence of each other; he shewing them severally where to write their names. But that the said *Thomas Wallis*, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The council for the plaintiff contended, that this was not a sufficient proof by one witness, of a compleat execution of the will. And they produced on the other hand, the other two subscribing witnesses; who in divers particulars did not give a clear and distinct evidence, and could not recollect whether they had signed one or two papers; or whether then, or at any time before the said *Thomas Wallis*'s death, they understood what they had so witnessed to be the said *Thomas Wallis*'s will, though *Wardell* seemed to admit he conjectured it so to be. But both *Wardell* and *Mathews* swore, that they did not see the said *Thomas Wallis* sign or seal either part.

part of his said will; that *Powell*, the other subscribing witness, was not at that time in the room; where (at the said *Thomas Wallis's* desire) they wrote their names to the two papers as they now appear; that the said *Thomas Wallis* did not declare or publish it as his will, nor did they know it to be a will. The defendant's counsel then called *Richard Price*, the said *Thomas Wallis's* groom, who swore, that one morning in the beginning of *July 1760*, *James Wardell* told him that his master had much wanted him; and that upon his the said *Price's* offering to go to his master to receive his orders, the said *Wardell* told *Price* that the business was done, and that *Powell* had supplied his place; and that he the said *William Powell*, *James Wardell*, and *Isabella Matthews* had that morning been witnessing their master's will. And *Sarah Dixon* being called swore, that in the beginning of *July 1760*, *Isabella Matthews* came one morning after breakfast into the kitchen, and told her that she the said *Matthews*, *James Wardell*, and *William Powell*, had that morning witnessed their master's the said *Thomas Wallis's* will, though he had not told them it was so. Upon this state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, publication of a will was an essential part thereof; and if so, there is nothing in that statute to take it away: And further it was insisted, that by the said statute there are four requisites to constitute a good and valid devise of lands; 1. That it shall be in writing. 2. That, it shall be signed by the party devising, or by some other person in his presence, and by his express directions. 3. That it shall be attested and subscribed in the presence of the deviser by three or four credible witnesses. 4. That the words *attested and subscribed* must import, that it shall be published as a devise or will by the testator in the presence of the said witnesses. On the contrary, for the defendant

defendant it was insisted, that neither before nor since the statute publication was necessary; and that by the statute, only the three first requisites are necessary, which in the present case were all complied with, the devise being in writing, and signed by the testator in the presence of three credible witnesses who had subscribed their names as witnesses to the same in the presence of the testator and of each other; and further supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator using these significant words to all the witnesses when he called them up to the table "*take notice,*" and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witnesses did, was a sufficient execution and publication of his will; that the words "*signed, sealed, published and declared,*" being all written in the testator's own handwriting, and the witness *Powell* swearing that both the parts of the will lay open to the inspection of all the witnesses when they subscribed their names; and it appearing by the evidence of *Price* and *Dixon* that both the other witnesses had declared that they had been attesting the said *Thomas Wallis's* will; this was much stronger than the case of *Peat and Ougly*, reported in *Com. Rep.* 197. And Mr. justice *Dennison* was of opinion, if the witnesses for the defendant were credited by the jury, that this was a due execution within the statute, and a sufficient publication; and for this cited the case of *Trimmer and Jackson* lately determined in the court of King's Bench. And the jury found accordingly a verdict for Mrs. *Willis*

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the defendant. Nevertheless, the plaintiff's council insisted, that the point, whether a good publication or not, should be reserved for a case to be argued above. But the matter was compromised, on the defendant's remitting the costs. *Wallis and Wallis 2 Burn's Eccl. Law 545.*

Note, the case of *Peate and Ougley* was, where the testator produced to the witnesses a paper folded up; and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or say what it was; but it was all written by the testator's own hand. It was objected, that this was not a good execution of the will within the statute; for it is not sufficient that the witnesses write their names in the presence of the testator, without any thing more; but they must attest every thing, to wit, the signing of the testator or at least the publication of his will: But here the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other part, it was insisted, that the execution was sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, *signed, sealed, and published* as his will, prays the witnesses to subscribe their names so that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will. And *Trevor* chief justice inclined, that here was sufficient evidence of the execution, and the jury found it accordingly. But as to the matter of law, he permitted it to be found special. And it doth not appear further what became of it. *2 Burn's Eccl. Law 547.*

The case of *Trimner and Jackson* was, where the witnesses were deceived by the testator at the time of the execution, and were led to believe from the words used by the testator at the execution of the instrument

strument that it was a deed and not a will. It was delivered as his act and deed; and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the court, as it is said, for the inconveniencies that might arise in families, from having it known that a person had made his will, that this was a sufficient execution. 2 *Burn's Eccl. Law* 547.

To a will of lands there are four witnesses, one of them was gone beyond sea, two swore they saw the will executed by the testatrix, and that they subscribed the same in her presence; the third swore that he subscribed the will as a witness in the same room at the request of the testatrix. *Lord Chancellor*: The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator and his own subscribing it in the presence of the testator, but likewise the rest of the witnesses subscribed their names in the presence of the testator; and then one witness proves the full execution of a will, since he proves that the testator executed it, and likewise that the three witnesses executed it in his presence. He held that the bare subscribing the will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room in a clandestine fraudulent way; and then it would not be a subscribing by the witnesses in the testator's presence merely because in the same room; but that here it being sworn by the witness, that he subscribed the will at the request of the testatrix and in the same room, this could not be fraudulent, and was therefore well enough. *Mich. 1721. Longford v. Eyre, Wil. Rep. 740. 2 Eq. Cas. Abr. 660. pl. 6. 762. pl. 9.*

A witness swears that he subscribed the will in the same room, and at the testator's request, 'held good, though not said in the testator's presence.

By a deed of settlement power was given to *William Fenwick* by his last will, or any writing purporting to be his last will under his hand and

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seal, attested by three or more credible witnesses, to charge lands with any sum not exceeding 2000*l.* to be paid to such persons and in such proportions as he should appoint. *William Fenwick*, by his last will in writing under his hand, attested by three witnesses, but not sealed, reciting the power, disposed of the 2000*l.* amongst his relations; two of the witnesses swore that the will was signed by the testator in the presence of all three witnesses; but the third swore that the testator having written and signed the will before, called for the witnesses, and declared that writing to be his last will, and that all the three witnesses were present, and subscribed their names in his presence. It was held that the will was void as a charge, for want of a seal. *Hil. 1728. Dormer v. Thurland, 2 Wil. Rep. 506. 2 Eq. Cas. Abr. 663. pl. 11. 764. pl. 15.*

Trust of lands limited to A. his heirs and assigns, or to such as he or they should appoint. Cestuy que trust devises the lands by a will attested by two witnesses, the will is void, and will not operate as an appointment.

John Wagstaff conveyed lands to trustees and their heirs, to the use of them and their heirs in trust, (after certain sums raised) to convey the premises to *J. S.* his heirs and assigns, or to such persons as he or they should direct. The sums were raised, and *J. S.* by will, attested only by two witnesses, devised the premises to *J. N.* It was objected, that the trust being that the trustees should convey the premises to such persons, as *J. S.* his heirs or assigns should direct, this will, though not good by way of devise, should however be effectual as an appointment; like a copyhold surrendered to the use of a will, which may be devised by a will attested by two witnesses or one witness only. The Lord Chancellor said, as to the case put of a copyhold it had been adjudged to be good; but if it had not been settled, it might be more reasonable to say, when a man surrenders his copyhold to the use of his will, a will of his copyhold shall be so executed, and in such manner, as by the statute a will of lands ought to be executed; but it having been ruled otherwise he would not shake

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shake it; however he was not for carrying it one jot farther: That the copyhold passed by the surrender, and not by the will, which was only a declaration of the use of the surrender; that it was no more than a common trust of lands in fee-simple, viz. in trust for J. S. his heirs and assigns, or such person or persons as he or they should appoint; the last words are no more than what was implied before; *et expressio eorum quæ tacite in sunt, nihil operatur*. Where a trust is limited to A. and his heirs, A. may appoint the trust to J. S. and J. S. is then assignee of A. A trust of an inheritance cannot be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law was otherwise, it would occasion the same inconveniencies as to frauds and perjuries, as were occasioned before the statute by a devise of a legal estate in fee-simple. In the case of Dr. Johnson (*Vide 2 Ven. 597.*) where a man devised lands to a charity by a will attested only by two witnesses, lord Cowper decreed the same to be void, notwithstanding it was there objected that the will might operate as an appointment according to the statute of 43 Eliz. of charitable uses. This will does not refer to the deed of trust, but J. S. has devised the land as owner thereof, without any relation had to the pretended power; which is like the case in *Inst. 111, 112*. Wherefore it was adjudged that the will was void, and that the trustees should convey the premises to the heir at law of the testator. *Mich. 1724. Wagstaffe v. Wagstaffe, 2 Wil. Rep. 258. 2 Eq. Cas. Abr. 763. pl. 12.*

Devise of lands to a charity, attested but by two witnesses, void.

In Hil. vacation 1727. the master of the Rolls admitted it to be settled, that where a copyhold in fee is settled to the use of one's will, such will, tho' executed in the presence of one or two witnesses only, is good; because it passes by the surrender, and not by the will, which is only a declaration of the use of the surrender: But if a copyholder

Where a copyhold is surrendered to the use of a will, there need not be three witnesses to the will.

be seised only of the trust or equity of redemption of the copyhold, and devises such trust or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will to pass this trust, and the trust and equity of redemption of all lands of inheritance, are within the statute of frauds and perjuries; otherwise great inconveniencies would arise therefrom: And it is no prejudice to the lord of the manor to compromise the trust of a copyhold within that statute; because the person who has the legal estate of the copyhold is tenant to the lord, and liable to answer all services. 2 *Wil. Rep.* 261.

Witnesses to a will not necessary to pass either the legal estate in copyhold lands, where there is a surrender to the use of a will, or the trust estate where there is no surrender.

A. S. was intituled to two thirds, and his brother *W. S.* was intituled to one third of certain copyhold lands called *K.* it was agreed that *A.* should be admitted to the whole in trust, nevertheless to account to *W.* for his share: Soon after *W.* purchased *A.*'s share; but to avoid the charge of a surrender, *A.* by deed declared that the lands belonged to *W.* and that he would at any time surrender. After *W.* made his will in writing, but not attested by any witness, wherein was this clause, *what estate I have, I intend to settle in this manner: My estate in K. which is 135 l. per Annum, 128 l. at the Exchequer, 1000 l. stock at the South Sea, and 500 l. stock; all which I give to my dear brother the reverend Mr. A. S. After his decease my desire is, that it should be disposed after this manner: To Mr. W. T. my estate at K. and then gave the other part of this estate to other persons. No surrender was made of the copyhold to the use of this will. It was held, 1. That the will of a copyhold tenement, not attested by any witnesses, is sufficient to declare the uses of a surrender, to the use of a will, [The attorney general and Barns, 2 *Vern.* 597] for the party is in by the surrender and not by the will; but the will must be in writing. 2. That the plaintiff, *W. T.* is well intituled though there is no surrender, and though the will is not attested by*

by any witnesses: This is merely the case of a trust of a copyhold estate, and the testator could not make a surrender: Equity follows the law; as attestation was not necessary to convey the legal estate in the copyhold, so it is not necessary to convey the trust in the copyhold. 3. That *A. S.* being dead, *W. T.* is intituled to an estate in fee; the testator shewing by the words, *what estate I have, I intend to settle in this manner*, an intention to make a settlement of his whole estate. [*Ibbotson & Beckwith, Mich. 9 Geo. 2. Forrester's Rep. 157.*] 28 April 1740. *Cane' Tuffnell* against *Page, Barnard: Chan. 9. 2. Atk. Rep. 37. pl. 24.*

Words in a will passing a fee simple collected from the testator's intention.

Cases cited for the plaintiff *W. T.* 2 *Vern.* 498. 2 *Lev.* 91. *Equ. Ab.* 178. For the defendant, *Miller and Mohun*, 21 June 1732. 1 *Cro.* 447.

Of Nuncupative Testaments.

A Nuncupative testament is when the testator, without any writing, doth declare his will before a sufficient number of witnesses; and it is called *nuncupative a nuncupando, i. e. a nominando* of naming; because when a man maketh a nuncupative testament, he must make his executor, and declare his whole mind before witnesses. This kind of testament is commonly made when the testator is very sick, weak, and past all hopes of recovery. *Perkins* 209. And in consideration hereof it is, that testaments are so much favoured which be made in such perillous times, for then the testator cannot conveniently stay to ask counsel of such points as are doubtful in law.

Nuncupative testament, what it is.

Why so called.

Commonly made in extremis. Therefore favoured.

A nuncupative testament may be made not only by the proper motion of the testator, but also at the interrogation of another.

May be made diverse ways.

In the making a nuncupative will or testament this is chiefly to be observed; that the testator do name his executor, and declare his mind by word

Of the form of words in a nuncupative testament.

Obscurity and ambiguity to be avoided.

Obscurity where it is, and how avoided.

Ambiguity where, and how avoided.

Wills favourably interpreted. In contracts interpretation to be made against the party.

The danger of making nuncupative testaments.

What shall be a testament in writing, and not a nuncupative testament.

of mouth without writing [before witnesses: As for any precise form of words, none is required; neither is it material whether the testator speak properly or improperly, so that his meaning do appear. That the testator's meaning may be the better understood, he must, as much as can, avoid obscurity and ambiguity. Obscurity is avoided by speaking plainly; for an obscure speech is either that which cannot be understood at all, or very hardly, by reason of the cloudy darkness thereof, or for want of plain utterance. Ambiguity is avoided by speaking simply and certainly; for an ambiguous speech is that which yields diverse senses to the hearers who remain doubtful in whether sense the speaker is to be understood. Although the law gives favourable interpretations to sustain the testament, where the disposition is obscure, ambiguous, or incertain: Contrary to the nature of contracts, where he that speaks obscurely or ambiguously, is said to speak at his own peril, and that such his speech is to be taken strongly against himself; nevertheless, how favourable soever the law be towards dead men's wills, the lawyers are not so favourable to their clients; and therefore, if it be but to avoid long and costly suits, it is meet that the testator utter his mind as plainly and certainly as he can.

But I advise every man to make his will by writing, and not to leave it to the doubtful fidelity, or slippery memory of witnesses; for as it has been said of leases parol, that they be leases perjured, or of perjury, so I fear it may be said of parol wills. Besides a man oftentimes declares this or that part of his will, which his wife, child or friend dissuading, he departs from; yet witnesses wishing it to stand, will perhaps affirm it as part of his will. As for a disposition of goods and chattels, if it be written before the death of the testator, though it be never brought to him or read to him after the writing thereof, it is good enough if there

there be an executor named, and is a testament in writing, and not a nuncupative testament. Suppose that many bequests and legacies are given by a will, and many things expressed to be done, but no executor is named in the writing, only *A.* and *B.* are by word of mouth named executors: This is no will in writing, but nuncupative only; for that one essential part of the will, viz. the making of an executor, is wanting in the writing.

What shall be a nuncupative testament and not a testament in writing?

By the statute of frauds and perjuries, 29 *Car.* 2. c. 3. *sect.* 19. for preventing of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury, It is enacted, that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds.

No nuncupative will for goods exceeding 30 l. good,

1. That is not proved by the oaths of three witnesses (at the least) that were present at the making thereof:

That is not proved by three witnesses.

2. Nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect:

Nor unless testator bid persons present bear Witness, &c.

3. Nor unless such nuncupative will were made in the time of the last sickness of the deceased:

Nor unless made in the last sickness, &c.

4. And in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will: Except where such person was surprized or taken sick, being from his own home, and died before he returned to the place of his or her habitation.

Or at the testator's house, &c.

Except, &c.

After six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof were committed to writing within six days after the making of the said will. *Same Stat. sect.* 20.

After six months, no testimony thereof to be received, unless put in writing within six days after making said will.

No letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen

No probate thereof till after 14 Days.

And process to
call in the widow,
or next of kin.

fourteen days at the least after the decease of the testator be fully expired: Nor shall any nuncupative will be at any time received to be proved, unless process hath first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please. *Same Stat. sect. 21.*

Wills of soldiers
and sailors ex-
cepted.

Notwithstanding this act, any foldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages or personal estate, as he or they might have done before the making of this act. *Same Stat. sect. 23.*

Jurisdiction of
courts, as to the
probate of such
wills, saved.

Nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the archbishop of *Canterbury*, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect, subject nevertheless to the rules and directions of this act. *Same Stat. sect. 24.*

Who are good
witnesses to prove
a nuncupative
will.

All such witnesses, as are and ought to be allowed to be good witnesses upon trials at law by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto. *Stat. 4, 5 Anne, c. 16. sect. 14.*

Short notes for a
will taken in ex-
tremis, which
carry no meaning
without the in-
terpretation of
witnesses, shall
amount only to
a nuncupative
will.

A. being very ill, desired *B.* to make her will; who wrote down only names and initial letters to this effect, viz. To *Thomas West* 200*l.* to *Jo. Dav.* 100*l.* to *Ceb. Cro.* 50*l.* to *fist.* to *self* 10*l.* and to several other persons in like manner, to above 400*l.* which being more than her estate, *B.* made an alteration in a second column, by substracting part of the sums from some of the legatees, as set down in the second column, and then told *A.* the sense of the proposed devises: There were two persons in the room, who did not hear any thing that passed between *A.* and *B.* but only heard the testatrix at last pronounce the

al;

all was well. B. went to a scrivener to have the devises drawn out at length and in form; and before she returned the testatrix died. The judge below pronounced for this will; but upon an appeal to the delegates, his sentence was reversed. And in this case it was agreed, that if the will had been written in words at length, so as they had carried a sense and meaning in themselves, it had been a good will; for that there was one witness that wrote it, and two that heard the testatrix pronounce that it was well; which would have been intended to have amounted to a second witness, in regard it appeared on all hands by several witnesses, that the testatrix did then seriously dispose herself to make her will; and for that was quoted the case of one *Pepper*, where a person disposed herself to make her will, and dictated it to a person who wrote it down, and another, not called in as a witness, stood behind the hangings out of curiosity; and yet such will was allowed to be good, being proved by these two witnesses; But they distinguished this case, because the will was not substantive, but was to take its sense from the interpretation of the witness, and so there would be *innuendo* upon *innuendo*, which made it purely a nuncupative will, and as such it is void, not being attested by the number of witnesses required by the statute of frauds and perjuries, 29 Car. 2. c. 3. sect. 19. 26 Feb. 1710. between *Davis* and *Gloester* before the delegates.

A testamentary schedule without witnesses, or an executor, has been declared a will, *Powel v. Beresford*, 2 Lord Raym. 1282.

Dr. *Shallmer*, by will in writing, gave 200 l. to the parish of St. *Clement Danes*, and after *Prew* the reader coming to pray with him, his wife put him in mind to give 200 l. more towards the charge of building their church; at which though Dr. *Shallmer* was at first disturbed, yet after he said he would give it, and bid *Prew* take notice

A nuncupative will must be proved by the oath of three witnesses, as well as have three witnesses present at the making.

of

Gilb. Chanc.
Cas. 294.

of it, and the next day bid *Prew* remember what he had said to him the day before, and died that day. Within three or four days after the doctor's widow made a memorandum in writing of the said last devise, and so did her maid. About a month after *Prew* died, and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor had said to him about the 200*l.* and purporting that he had put it into writing the same day it was spoken; but that first writing did not appear, neither did these three memorandums expressly agree. About a year after, on application made by the parish to the commissioners of charitable uses, on the testimony of Mrs. *Shallmer* and her maid, and the producing these memorandums, they decreed the 200*l.* to the parish; but on exceptions taken to the decree the lord chancellor held the will to be void, because not proved by the oath of three witnesses: For though Mrs. *Shallmer* and her maid had proved it, yet *Prew* was dead; and the statute requires not only three witnesses to be present at the making a nuncupative will, but that the same should be proved by the oath of three witnesses. *Trin.* 1704. between *Philips* and the parish of St. *Clement Danes*, *Eq. Cas. abr.* 404. *pl.* 2.

When a nuncupative will for above 30*l.* not reduced into writing within six days, shall be valid, and operate as a trust.

A daughter deposits 180*l.* in the hands of her mother (the defendant) and afterwards makes her will in writing, and thereby devises several legacies, and makes her mother executrix, but takes no manner of notice of this 180*l.* But afterwards by word of mouth she desired her mother to give this 180*l.* to the plaintiff, if she thought fit; and then soon after died. The mother proved the will, and a bill was brought against her for this 180*l.* The mother by her answer admits, that she had such a sum in her hands, that her daughter did make such request to her, but had left it to her election, whether she would give it the plaintiff,

or

or not, by the very form of the devise; and insisted that she did not think fit to give it to the plaintiff. In this case it was agreed, 1. That this was not good as a nuncupative will, being for above 30*l.* and not reduced into writing within six days after the speaking. 2. That if the defendant had insisted on the statute of frauds and perjuries, the court could not have relieved the plaintiff as upon a trust; but in this case the defendant having by her answer confessed the trust, there was no danger of perjury, from variety of proof, which was the mischief the statute intended to provide against, and therefore the court took it to be in nature of a trust, and decreed for the plaintiff; and relied principally on the case of *Kingsman and Kingsman*, where a man devised away an estate of 2000*l. per Annum* from his son and heir, to a bargeman; and by his will devised 20*l.* a quarter to his son; and at the time of his will desired, that if his son gave no trouble or disturbance concerning his will, and behaved well, that he might make it up 40*l.* a quarter, if he thought fit; and the court decreed the 40*l.* a quarter to the son. *Pas.* 1718. between *Jones and Nabbs*.

Tenant in tail of the manor of *W.* made a nuncupative will, which was afterwards reduced into writing; and by it he devised that his executors should purchase a parcel of ground in *Cricklade* in *Wilts*, for the erecting a free-school there; and gave to the said school 20*l. per annum* rent, to be paid out of his said manor of *W.* and died, before the statute of frauds; and the will was proved in the spiritual court as a nuncupative will. In pursuance of the will the executors bought the ground in *Cricklade*, and built the school thereupon; and the commissioners for charitable uses decreed the issue in tail of the manor of *W.* to pay the arrears of the 20*l. per Annum* rent to the school.

Devise by nuncupative will by tenant in tail of rent out of lands to a charity, void, though made before the statute of frauds.

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The issue in tail excepted to the decree, and the exception coming on before lord chancellor *Maccart*, it was insisted for the decree, that though this was void as a will, yet it was good as an appointment, by the stat. 43 *Eliz.* c. 4. as if a tenant in tail had devised land (2 *Vern.* 453, 454.) without having levied a fine, or suffered a recovery; or a copyholder had devised his copyhold to charitable uses without surrendering it to the use of his will, such devises would be made effectual: But the lord chancellor reversed the decree; forasmuch as at common law lands or real estates were not deviseable, and by the stat. 32 *H.* 8. it is as much required that a will of lands should be in writing, as by the statute of frauds and perjuries it is required that such a will should have three witnesses: And as in *Johnson's case* (2 *Vern.* 597. *Prec. Ch.* 270.) decreed by lord chancellor *Cowper*, a devise of land in writing to a charity since the statute of frauds, but not attested by three witnesses, was held to be void; so a devise of land without writing should be void also; especially it being by tenant in tail, and of a rent too, which cannot pass but by deed, and it would be very dangerous to allow of nuncupative wills of lands.

Sed Quere, et vide Duke's Charitable Uses 81. *Stoddard's case*, where one before the statute of frauds devised a rent of 10 *l. per Annum* out of lands to a charitable use, and willed that one *Hugh* the scrivener should put it into writing; which was accordingly done; and decreed that this nuncupative will was good; for "though a rent cannot be created without deed, yet by the words of 43 *Eliz.* it may be appointed without deed; and though the nuncupative will be void as a will, it is good as an appointment." And it seems that the statute of 43 *Eliz.* which makes these appointments to charities good, being subsequent to the stat. 32 *H.* 8. of wills, supercedes and repeals that statute; but it is true that the statute of frauds

frauds and perjuries being subsequent to the statute of 43 Eliz. doth repeal that statute; and therefore since the statute of frauds, &c. an appointment of lands to a charity by a will not attested by three witnesses, is void. *Mish.* 1714. *Jenner v. Harper*, Will. Rep. 247. *Salk.* 163. *Gilb. Chan.* 341. *Gilb. Eq. Rep.* 44. *Prec. in Chan.* 389. 2 *Eq. Caf. Abr.* 191. pl. 5.

CHAPTER II.

What Persons are capable of making a Testament; of Infants, Feme Coverts, Lunatics, Ideots, Old People, Captives, Persons Deaf and Dumb, Blind Men, Traitors, Felons, Felo's de se, Outlaws, Persons in Extremis, Tenant in Tail, and Ecclesiastical Persons ---- Of Testaments obtained through Fraud or Fear.

AS touching infants we are to distinguish between a will of lands and tenements, and a testament of goods and chattels. By the statute 34, 35 H. 8. c. 5. *sect.* 14. it is enacted, That wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of one and twenty years, ideot, or by any person *de non sane* memory, shall not be taken to be good or effectual in law.

Infants under 21, Females covert, ideots, &c. cannot make a will of lands.

If one being under the age of twenty-one years, makes his will, and thereby devises his lands, and after attains the age of twenty-one years; and dies without making any new publication of his will, the will is void. *Mish.* 15 Car 2. between *Herbert and Forbale*, *Sid.* 162. agreed *per Cur'* on

Devise of lands by an infant who attains his full age, and dies without a new publication, void.

a trial at bar. *Vide And.* 182. *Dyer* 143. *Raym.* 84.

A male infant of the age of 14 years, and a female infant of the age of 12 years may make a testament of goods and chattels,

As to a testament of goods and chattels, we are to consider whether the infant be a boy or a girl. A boy cannot make his testament before he has attained his age of fourteen years, nor a girl before she has attained her age of twelve years; inasmuch that if before they attain the said respective ages, they were of that ripeness of wit, that they were *Doli Capaces*, capable of deceit, or able to discern between good and evil, truth and falsehood, yet could they not make any testament, or dispose of their goods and chattels; neither will testaments made by infants, made under those respective ages, become good, though the infant should after attain his proper age. *Godolph. Orph. Leg.* 505 *Law of Ex.* 10. *Hil.* 8 *An.* *Hyde v. Hyde.* In chancery it was agreed, That a male infant of fourteen years of age, and a female of twelve years of age might make a will of a personal estate; and Mr. *Gilbert* said it was so agreed by lord keeper *Wright* in the case of *Sharpe and Sharpe*, wherein they followed the civil law of *Justinian* for their consent to marriages at such ages. *Gilb. Rep.* 74.

Mr. *Wentworth* saith, he thinks that at the age of fourteen, being in the judgment of the law the age of discretion, a person may make a testament. *Wentw.* 214.

And here it may be proper to observe, that all the books in general do remark with some degree of wonder, that Mr. *Perkins* saith, an infant of four years of age may make a testament. (*Perk.* 210.) But surely this must have been an error of the press; which might possibly enough happen from a similitude of the words, or especially of the figures 4 and 14. 2 *Burn's Eccl. Law* 505. See *Gibf. Cod.* 461.

What if the last day of the year be not finished.

If an infant male or female have attained to the last day of fourteen or twelve years, the testament by him or her made on the very last day of their several

several ages aforesaid, is as good and lawful as if the same day was already then expired: Likewise if after they have accomplished these years of fourteen or twelve, he or she do expressly approve the testament made in their minority, the same by this new will and declaration is made strong and effectual.

Testament made during minority, approved by testator at his full age.

A feme covert cannot make a will of lands or tenements by the statute 34, 35 H. 8. c. 5. sect. 14. vide antea especially to her husband.

Feme covert cannot make a will of lands, especially to her husband.

The queen the wife of the king may make executors. 24 E. 1. Rot. Clausarum, M. 11. Executors were made and admitted good. Rol. Ab. 912. N. p. 2.

Queen consort.

If a feme sole makes a testament, and afterwards marries and dies, yet she being intestable at the time of her death, by reason her husband is then living, the testament is void: For it is necessary to the validity of a testament that the testator have validity to make a testament, not only at the time of the making thereof, when the testament receiveth its essence or being; but also at the time of the testator's death, when the testament receiveth its strength and confirmation. Forse v. Hembling, 4 Co. And. 181. Goldf. 109. Godol. 32, 383. 2 D. A. 530 R. p. 3.

A feme sole makes a testament then marries and dies, the testament is void.

And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis, some years ago before the delegates: Mrs. Lewis a widow, made a will; soon after, she married again, in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained; and being found after her death, the question was, whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and shewed,

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that

that among the *Romans*, if a man had made his will, and was afterwards taken captive, such will, revived and became again in force, by the testator's repossessing his liberty. But it was observed on the other hand, that marriage is a voluntary act, but captivity is the effect of compulsion. And the will was adjudged not to be good. *2 Burn's Eccl. Law* 508. *Lawy. Mag. for Hil. Term* 1761. P. 77.

But not if she confirm the same after the husband's death.

If a Feme covert make a testament during coverture, and having survived her husband, does after his death approve and confirm that same testament; in this case the devise is good, by reason of her new consent or new declaration of her will.

Feme sole makes a will, marries and survives her husband, the will is good.

If a feme sole makes a testament, marries and survives her husband, this will is good. *Bret v. Rigden, Plowd.* 373.

Thus much of a devise of lands by a feme covert.

A feme covert cannot make a testament of goods or chattels personal, without her husband's consent. See *Gibb. Cod.* 461, 462.

All the goods and chattels personal which a woman hath at the time of her marriage, other than such as she hath as executrix or administratrix, are by the law totally divested out of her, and settled in the husband, as fully, *ipso facto*, upon the very marriage, as any that he had before the marriage; of these therefore she can make no testament without his licence and consent, any more than she can of any other of his goods and chattels: But though the testament be void, if the husband after the wife's death consent to this testament or gift, by delivering the goods bequeathed to the executor, or assenting that the legatee take them by virtue of the testament, this amounteth to a new gift by the husband. Upon licence or consent of the husband, the wife may make a testament of his goods: And although the nature of a licence is to go before the act, and the property of authority, or authorizable consent, is to concur with the act, yet if a feme covert make a testament of her husband's goods, without her husband's knowledge, and

Whether the consent may go before the making the testament, or concur or may follow. *26 E. 3.* 71. *M. 2 E. 2.* Devise 14.

and the executors prove the testament, and the husband delivers the goods devised to the executors, he hath hereby made the testament good, notwithstanding he was not privy to the making thereof; because the law presumes that he gave his consent at the beginning when the testament was made: And therefore the will being proved, and the goods being delivered accordingly, it is too late for the husband to revoke it. But though the husband do give his wife licence to make a testament of his goods, he may nevertheless revoke it, not only at the time of making the testament, but after her death, at least before the testament is proved.

Where and when the Husband may revoke such consent.

If a woman has a lease, an estate by extent, the next avoidance of a church, or other chattel real, these are not devested out of her into her husband by the marriage; but in case she survives him, they continue to her as before; no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his life-time; though not by will; yet such a woman in her husband's life-time cannot make a testament of or for these things without her husband's consent; but she dying before him, they would by operation of law accrue to him. *Wentw.* 198.

A feme covert cannot make a testament of chattels real without her husband's consent.

There is another sort or kind of goods, or rather interests a woman may have, viz. Debts or things in action; which as the former are not devested out of her into the husband by the marriage, yet she cannot make a testament of them without the husband's assent, although they be one degree farther from the husband than the said chattels real; for although the husband survives the wife, he shall not be intitled to them as to the former: But if the wife makes him executor, as she may, or if after her death he takes out administration of her goods, then he is thereby intitled to them. *Oguel's case* 4 *Co.* 51. *Jones*

Nor of debts, or things in action. *Wentw.* 199.

May make her husband executor.

and *Roe. Jon.* 175. *Cro. Car.* 106. *Finch and Bodyl.* 2 *And.* 91, 92. *Moor* 339. *pl.* 459. 2 *D. A.* 512. *p.* 9. 3 *D. A.* 459. *N. p.* 3.

A wife whose husband is banished, may make a will.

A wife whose husband is banished for his life by act of parliament, may make a will, and in every thing act as a feme sole, as if the husband was dead. *Trinity* 1689. between the countess of *Portland* and *Prodgers*, 2 *Vern.* 104. And the legatees under the lady *Sandy's* will, whose husband was so banished, were decreed their legacies.

A feme covert, executrix, may, for the continuation of the executorship, make a testament without the husband's assent.

If a feme covert is executrix to some other person, and in that right hath diverse goods and chattels, these are not devided out of her, because she hath them not merely to her own use, but as representing the person of another: The wife in this case may, for the continuation of the executorship, make an executor, and consequently a testament, without the consent or assent of her husband. 12 *H. 7.* 24. *b.* *Sed vide Rel. Abr.* 608. *Swin.* 89.

The testament, without the husband's assent, of a feme covert, having goods as executrix, and debts in her own right, shall be good as to the first, and void as to the latter.

If a feme covert, having debts due to herself, and also as executrix to another, makes a testament without her husband's assent and dieth; as touching the goods and credits, or things in action appertaining to her as executrix, the testament shall stand good, and her executor may prove it contrary to the husband's will; and as to the credits appertaining to her in her own right, the testament is void, and thereof the husband may have administration; she shall die both testate and intestate, with a will, and without a will; shall have both an executor and administrator. *Vide 1 Mod.* 211. 2 *D. A.* 44. *p.* 11. 512. *p.* 8. 2 *Rel. Ab.* 247. *p.* 8 2 *Mod.* 172, 173. 3 *D. A.* 359. *N. p.* 7.

The Will of a feme covert executrix, restrained.

1. Where she doth not make an executor, but bequeatheth the

The rule, that a feme covert executrix may make her will of those goods whereof she is executrix, is restrained in two cases.

The first is where she doth not make an executor, but bequeatheth the goods whereof she is executrix,

executrix, by devise or legacy; in this case the goods of her testator by devise or legacy. *Bransby v. Crantham*, Plowd. 525. will is void, because an executor may not dispose of the goods of the testator, otherwise than to the use of the testator, to the payment of his debts, performance of his will, &c. and therefore may not give or devise the same by legacy, for that were to dispose of the testator's goods as if they were the proper goods of the executor, and to convert the same to the private use of the legatee, and not to the use of the testator. But when an executor doth only make another executor, the second executor doth stand chargeable and accountable for the distribution of the first testator's goods to the use of the same testator as did the former executor, and is not by the laws of the land reputed for the executor of the executor, but of the former testator; so is not a legatee. *Swinb.* 90.

The second is where she is not only executrix, but legatee also, and hath accepted of the thing bequeathed not as executrix, but as legatee; and in this case the will of the feme covert is also void. For she taking the thing bequeathed not as executrix, but as legatee, doth thereby make it her own proper goods, and consequently her husband's, and therefore cannot be given from him without his licence or consent: If it does not appear whether the wife took the thing bequeathed as executrix or Legatee it shall be presumed she took it as executrix. *Paramor and Yardly*, Plowd. 543. *Dyer* 177.

Although a feme covert being executrix may make her testament, and appoint an executor of those goods which she hath as executrix, and not as legatee, without her husband's assent; yet the profit and fruit which arise out of those goods which she hath as executrix during the marriage, as calves, lambs, and such-like profit of kine, sheep and cattle, do belong to the husband, and not to herself as executrix, and therefore she cannot

2. When she is both executrix and legatee, and taketh the thing bequeathed not as executrix, but as legatee.

A feme covert executrix cannot, without her husband's assent, make a testament of the profits arising during coverture of the things she hath as executrix.

not make her testament of such fruits and profits without her husband's approbation.

If a wife licensed by her husband to make a testament, makes more testaments than one, the licence shall be extended to the last testament.

If in the case where a feme covert cannot make testament without the husband's licence, the husband grants a licence to the wife to make a testament of a certain portion of his goods, (as it often happens by reason of bonds or covenants at or before marriage); and the wife so licensed doth make one testament and afterwards another, and perhaps a third or fourth; the licence shall be understood of the last testament, and not of the first.

Of a husband binding himself to permit his wife to make a will.

The husband may bind himself by covenant or bond, to permit his wife by will to dispose of legacies, &c. and this will be such an appointment as the husband will be bound to perform. *Cro. Eliz.* 27. *Cro. Car.* 219, 376, 597. but it does not operate as a will, neither ought it to be proved in the spiritual court, *1 Mod.* 211, 212. for the property passes from him to her legatee, and it is his gift. *1 Mod.* 211, *Per curiam*. If he once assent, he cannot after dissent, and where he is bound by agreement to let her make a will, his consent shall be implied till the contrary appears; and what shall be a sufficient evidence to an assent, *vide 2 Mod.* 172, 173.

Where a feme covert has power to dispose of money, she may do it by will without her husband's approbation, and tho' there is no agreement; that she shall make a will.

B. and his wife suffer a recovery of the wife's lands; and the uses are to the intent she may receive 6*l. per Annum* for her separate maintenance, then to the use of the baron for life, remainder to the feme and her heirs, till the heirs of the baron pay her, her executors, administrators or assigns 100*l.* The feme without any approbation of the husband makes her will, and gives the 100*l.* to *A.* and dies; the husband dies, the heir of the feme enters in behalf of *A.*: The heir of the baron exhibits his bill to be relieved, supposing, that in regard there was no agreement for her to make a will, the will is void; and if it was a right, it belonged to the baron as her administrator, and

so is extinct. *North* lord keeper : The intent was, that she should have power to dispose of the 100 l. which would be a vain act if the husband had power over it to prevent her ; but her will shall be a good will in equity to this purpose. *Trin. Mercur. 4 die Junii 1684. Bletso and Sawyer, vide Vern. 244. S. J. Dit. per counsel*, if a woman save money out of her separate maintenance, she may give it to whom she pleases.

May dispose of money, saved out of separate maintenance.

A person *de non sane* memory cannot make will of lands or tenements. *Stat. 34, 35 H. 8. c. 5. sect. 14. antea.*

A lunatic cannot make a will of lands.

Mad-folks and lunatic persons cannot, during the time of their furor or insanity of mind, make a testament, nor dispose of any thing by will, because they do not know any thing they do : For in making a testament, the integrity or perfectness of the mind, and not health of the body is requisite. And from thence came that common clause used in the testaments, *Being sick in body, but of perfect mind and memory.*

A lunatic cannot make a testament.

Why.

And so strong is this impediment of insanity of mind, that if the testator make his testament after his furor hath overtaken him, and whilst it doth possess his mind ; although the furor doth after depart or cease, and the testator doth recover his former understanding, yet the testament made during his former fit, doth not recover any force or strength thereby.

A testament made in time of furor, is not good, tho' the person after recovers his senses.

But if a mad or lunatic person has a clear or calm mind, then during the time of such his quietness and freedom of mind, he may make his testament, appointing executors and disposing of his goods at his pleasure ; so that neither the furor going before nor following the making of the testament, doth hinder the same testament begun and finished in the mean time ; much more is that testament good in law not only for goods and chattels, but also for lands and tenements, which was made by one of sound memory, never affected with

A testament made by one of sound mind, who after became a lunatic, is good. *Gilb. of Wills,*

any lunacy or insanity of mind until the testament was accomplished and finished; for then although after the testator become of unsound mind, (a thing often happening just before a man's death) yet that subsequent disability does not disannul the precedent testament or last will, the rather because this infirmity proceeds rather from the will, and by the visitation of God, than from any voluntary act of the party. *Vide 4 Co. 61. b. Forse and Hembling.*

He that objecteth
insanity, must
prove it.

Every person is presumed to be of sound mind and memory, unless the contrary be proved; and therefore if any person goes about to overthrow a testament by reason of insanity of mind, he must prove that impediment.

Whether it be
sufficient to prove
that the testator
was mad before
the making the
will.

It is sufficient for the party, who alledges that the testator was of unsound mind, to prove that the testator was besides himself before the testament was made, although he doth not prove the testator's insanity at the very time of making the testament; because it being proved that the testator was once mad, the law presumeth that he continued still in that case, unless the contrary be proved: Unless the testator was besides himself for some short time, and in some peculiar actions, and not continually for a long space, as for a month or more; or unless the testator fell into some frenzy upon some accidental cause, which cause was afterwards removed; or unless it was a long time since the testator was affected with the malady; for in these cases the testator is not presumed to continue in his former madness.

Witnesses must
yield a reason, if
they would prove
a man to be mad.

It is not sufficient for the witnesses to depose, that the testator was mad or besides his wits, unless they render and yield a sufficient reason to prove this their deposition, as that they did see him do such things or heard him speak such words, as a man of sound mind would not have done nor spoke.

If a lunatic person, or one that is besides himself at some times, but not continually, do make his testament, and it is not known whether the same was made whilst he was of sound mind and memory, or not; if the testament be so framed that no argument of frenzy can be drawn from it, it is to be presumed that the same was made during the time of his calm and clear intermissions, and it shall be held to be a good testament.

When a testament made by a lunatic, the time of making being unknown, shall be good.

An idiot cannot make a will of lands or tenements by the Stat. 34, 35 H. 8. c. 5. *sec.* 14. *vide antea*.

An idiot cannot make a will of lands or tenements.

An idiot, or a natural fool, is he, who, notwithstanding he be of lawful age, is so witless, that he cannot number to twenty, nor tell what age he is of, or who is his father or mother, or answer any other such easy question; whereby it plainly appears, that he has not reason to discern what is to his profit or damage, though ever so plain, nor is capable of being instructed by any other.

What Person is to be deemed an idiot.

Such an idiot cannot make a testament, nor dispose either of his lands or goods.

Cannot make a testament.

But if a man be of a mean understanding, as it were between a wise man and a fool, though he rather incline to the foolish sort, so that he may be termed *grossum caput*, a dull-pate or a dunce, he is not prohibited to make a testament; unless he be yet more foolish, and so very simple as that he may easily be made to believe things incredible and impossible, as that an ass can fly, and the like; for he, that is so foolish, cannot make a testament, because he has not so much sense as a child of ten or eleven years old; who is therefore intestable for want of judgment: Though it is said by some, that a man who has so much understanding as that he can measure an ell of cloth, tell the days of the week, or beget a child, shall not be accounted an idiot or fool natural, by the laws of the land: It is the better opinion, that

A man of a mean capacity may make a testament.

Yet if he be very simple, tho' no idiot, he may not. 6 Co. 23. a Cro. Jac. 497.

if this conclusion be true, to avoid effects prejudicial to the party, yet unless he has so much understanding as to conceive what is the nature of a testament, being well informed thereof and the matter plainly delivered, he is not fit to make a will, although he can measure an ell of cloth, tell the days of the week, or beget a child; For the making a will is an act that requires a greater share of understanding than any of these acts, especially the last, which proceeds rather from an instinct of nature than any capacity of reason, and which every brute animal not capable of reason can perform effectually.

If an idiot make
a testament
wisely.

If an idiot or natural fool should make his testament so wisely in appearance, that the same might seem rather to be made by a reasonable man than by one void of understanding; some have been of opinion, that such a testament is good in law; because Almighty God doth sometimes so illuminate the minds of the foolish, that in that case they are not inferior to wise men; but the better opinion is, that such a testament is not good in law; because the making a testament is an act to be performed with discretion and judgment, but an idiot, by presumption of law, does not understand what he speaks, though he seems to speak wisely, no more than *Balaam's* ass did when he reasoned with his master, or a parrot talking to passengers: And though the almighty do sometimes illuminate the minds of idiots, that they well understand what they speak, yet the thing seldom happening, the law does not presume the same from words only: And therefore unless further proof thereof be made by other circumstances, the law does not approve such testaments. Indeed if it appear by sufficient conjectures, that he had the use of reason and understanding at the time he made his testament, then doth the former opinion hold, that such testament is good in law.

An idiot's testament wisely framed, is sometimes good.

Though

Though age alone doth not take from a man the power of making a testament, (for a man may freely make his testament, how old soever he be, for it is not the integrity of the body but of the mind, that is necessary in testaments); yet if a man in his old age do become a very child again in his understanding, he can no more make a testament than a child can.

Old age alone don't hinder the making a testament. Aliter if a man by extreme old age become childish.

So it is, if a man either by reason of age or some other infirmity, become so forgetful, that he hath forgot his own name (which thing hath happened to diverse wise and learned men); because for any act that is to be performed with discretion, he is no more fit than a fool or an ideot.

He that hath lost his memory, cannot make a testament.

He that is overcome with liquor, during the time of his drunkenness is compared to a madman, and therefore if he make his testament at that time it is void in law; which is to be understood when he is so excessive drunk that he is utterly deprived of the use of reason and understanding; otherwise if he be not quite spent, although his understanding be obscured, and his memory troubled, yet he may make his testament in that case.

Whether one that is drunk may make a testament.

He that is taken captive by the enemy, during his captivity cannot make a testament.

A captive during his captivity, cannot make a testament. Though he after escape.

Insomuch that if he after do escape, the testament made whilst he was with the enemy, is void.

But if his testament was made before his captivity, then after his escape his testament is of like force as if he had never been captive; also if the testament was made before he was taken prisoner, and the testator die in captivity, yet is the testament good, and the executor by virtue thereof is to have all his goods here in *England*, as if he had died the day before his captivity.

What if made before his captivity.

If any person be taken captive by a pirate, *Turk*, infidel or christian when war is not proclaimed, he that is so taken, remains still a free-man; tament.

If taken prisoner by a pirate, &c. when war is not proclaimed, he may make a testament.

One condemned to a perpetual imprisonment, cannot make a testament.

Aliter if imprisoned for debt.

Except, &c.

man; and therefore, if he make his testament whilst he is so detained, the testament is good and lawful.

If a layman is condemned to perpetual imprisonment for some offence, it seemeth that he cannot make a testament.

But if any person is imprisoned for debt, such imprisonment being ordained for safety, not for punishment, he is not thereby disabled to make his testament, saving that the testament is not good when made in his favour at whose suit the testator is imprisoned, to the intent to extort the same.

Whether he that is deaf and dumb may make a testament.

A deaf and dumb man, if he be so by nature, cannot make any kind of testament or last will, unless it do appear by sufficient arguments, that he understands what a testament means, and that he hath a desire to make a testament; for if he has such understanding and desire, then he may by signs and tokens declare his testament: If he be not deaf and dumb by nature, but being once able to hear and speak, if by some accident afterwards he loseth both his hearing and the use of his tongue, then in case he be able to write, he may with his own hand write his testament or last will; but if be not able to write, then he is in the same case that they are who are both deaf and dumb by nature, that is to say, if he has understanding he may make his testament by signs, otherwise not at all.

Whether one that is deaf and not dumb can.

He that can speak and cannot hear, may make a testament as if he could both speak and hear, and it doth not signify whether defect came by nature or otherwise. If a man can speak, it is certain that he could once hear, otherwise he could never have been instructed to speak.

Whether one that is dumb and not deaf can.

He that is speechless only, and not void of hearing, if he can write, may make his testament himself by writing; if he cannot write, he may make his

his testament by signs, so that the signs be sufficient, and well known to them that be present.

A blind man may make a nuncupative testament by declaring his will before a sufficient number of witnesses; but he cannot make his testament in writing unless it be read before witnesses, and in their presence acknowledged by the testator for his last will; and therefore if a writing be delivered to the testator, and he not hearing the same read, acknowledges it for his will, this is not sufficient; for it may be, that if he had heard the same read, he would not have acknowledged the same for his will.

A blind man may make a nuncupative will.

Whether he may make a will in writing and how

He that is lawfully convicted of high treason by verdict, confession outlawry or presentment, shall lose not only his life, but forfeits to the king all his goods and chattels, and also all such lands, tenements and hereditaments as he has in his own right, use, estate or possession of any estate of inheritance, and therefore of consequence is intestable, insomuch that such a traitor is not only debarred from making any testament or kind of last will from the time of his conviction, but also the testament made before, doth by reason of the conviction, become void, as well in respect of goods and chattels, as of lands, tenements or hereditaments.

A traitor cannot make a testament, and why.

Testament of a traitor void from the time of the crime committed.

But if a man attainted of treason obtain the king's pardon, and be thereby restored to his former estate, then he may make his testament as if he had never been convicted; or if he had made a testament before his conviction and condemnation, the same, by reason of such pardon, recovereth its former force and effect.

If pardoned, may make a testament.

A felon lawfully convicted, cannot make any testament, or other disposition of any goods or chattels, lands or tenements; so no administration shall be granted of such a man. *D. 14 Eliz. 309.*

A felon, convicted, cannot make a testament.

Roll. Ab. 912. O. p. 1.

If indicted only,
and not convicted,
he may.

If a man be indicted, only of felony, and die before he be convicted or attainted, he may make his testament of his goods and chattels, lands and tenements.

If he will not
answer, but suffer
pain forte & dure,
he may make a
will of his lands.

If he be indicted, and being arraigned upon that indictment, will not answer, whereby he is to suffer *pain forte & dure*, and be pressed to death, in this case he forfeits his goods and chattels only, and not his lands and tenements; and therefore in that case it is supposed he may make a will of his lands and tenements.

Whether a man
apprehended for
felony, may make
a testament before
conviction or
judgment.

If a man be convicted and attainted of felony, with regard to his lands it is to be considered, whether he be attainted by outlawry upon appeal, or upon an indictment; for in the case of an appeal the defendant shall forfeit no lands but such as he had at the time of the outlawry pronounced; but in the case of an indictment he shall forfeit such as he had at the time of the felony committed; for in the case of an appeal there is no time alledged in the writ when the felony was committed, therefore of necessity it must relate in that case only to the time of the judgment of outlawry: But in the case of an indictment there is a certain time alledged, and therefore in that case it shall relate to the time of the felony committed set forth in the indictment. But in the case of an indictment there is also a diversity to be observed, for it shall relate to the time mentioned in the indictment, only, for the avoiding estates, charges and incumbrances made by the felon after the felony committed; but as to the mean profits of the lands it shall relate only to the time of the judgment. With regard to the felon's goods, we are to regard the time of his conviction or verdict, and not the time of his judgment. *Inst.* 390, 391. (*sed vide Perkins's Tit. Grants 29. contra.*) By the *Stat. 1 Rich. 3. c. 3.* no sheriff, bailiff, &c. shall seise the goods of a felon before he be convicted of the felony; and therefore, if before

By the conviction his goods and chattels are forfeited.

before conviction he do sell, give, or otherwise alienate his goods, such sale, gift, or alienation is good. Nevertheless, if he make his testament before conviction, in as much as the testament is not good before his death, it is void; nay if the testator be convicted of felony, but never executed, for that perhaps he may die in prison, or escape out of prison and die naturally, yet the testament is void by force of the conviction and judgment, unless he obtain his pardon, and therewithall full restitution to his former estate.

The testament of a felon convicted is void, though he be never executed.

If any man do wittingly and willingly kill himself, his testament, if he made any, is void, both as to the appointment of an executor, and as to any legacy or bequest of his goods and chattels, for they are forfeited.

A Felon de Se cannot make a testament.

An outlawed person is not only out of the king's protection, and out of the aid of the laws of the land, but also by means of the outlawry his goods and chattels are forfeited to the king, although he be outlawed but in a personal action, and even though the action should be unjust; and therefore he that is outlawed cannot make a testament of his goods and chattels so forfeited: In-somuch, that if the king having seised the forfeited goods of the testator, should give the same again to the executor, yet the testament is void in respect of such goods; neither can the legatees recover the same of the executors; for by the forfeiture and seisure the property of them is altered, and so ceasing to be the goods of the testator, do not charge the executors as assets. *Doct. & Stud. l. 1. c. 6.*

One outlawed in a personal action, his testament of his goods is void. *Doct. & Stud. lib. 2. c. 3.*

Though the king give back the Goods to the executor.

A man outlawed in a personal action may make executors; for he may have debts upon contract not forfeited to the king. *Mich. 43, 44 Eliz. B. R. Rol. Ab. 912. O. p. 4. 2 Rol. Ab. 806. p. 6.* Administration may be granted of such a man for the cause aforesaid. *Mich. 43, 44 Eliz. B. R. Shaw and Cutters, 1 Rol. Ab. 912. O. p. 5. Cro.*

Testaments, Last Wills, and Executors.

Cra. Eliz. 850, 851. In an action brought by an administrator it is no plea to say his intestate was outlawed. *Vide Woolley and Bradwell, Cra. Eliz.* 575. *Broun.* 55. *Hutt.* 53, 54. *Rel. Ab.* 914. T. 1.

Nota; Debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for trespass in battery and false imprisonment, &c.

If outlawed for felony, cannot make a testament either of goods or lands.

If a man be outlawed for felony, then he not only forfeits his goods and chattels, but also his lands and tenements, whether they are holden in fee-simple, or for term of life, and therefore he cannot make a testament either of his goods and chattels, or of his lands or tenements, for they are not his.

If an exigent for felony be awarded against a man, though by this he loses all his goods, yet he may make executors to reverse it. *Marsh's Case,* 5 Co. 111. *Cra. Eliz.* 225, 273. *Ow.* 147. *Leon.* 325. 3 D. A. 17. p. 14. So administration shall be granted of such a man, 5 Co. 111.

If a traitor felon or outlaw, be executor to another, he may in that behalf make a testament.

A person attainted of treason, convicted of felony, or outlawed, may be executor to another person, and as such may have diverse goods and chattels of the testator, which will not be affected by the attainder, conviction, or outlawry; and therefore as to them such a person may make a testament.

Whether a man, that is at the very point of death, may make a testament or not, will be considered in the following cases.

A man at the point of death, if of perfect mind, may make a testament,

Though his words be scarce intelligible.

First, If a man be so extremely sick that he is well nigh dead, yet if it appear undoubtedly by gesture and sensible speeches, that he is of good understanding and sound memory, he may without question make his testament. And though the testator cannot speak so plainly and distinctly as he used to do, and can scarcely be understood, (his

(his tongue being perhaps swollen or stiff with the heat of the distemper) yet the testament is good.

Secondly, If a man is at the point of death, and it does not appear plainly whether he is of perfect mind and memory, if he can speak so distinctly as to be understood, then he is presumed to be of perfect mind and memory, and therefore in such case may make his testament; but if he cannot speak so distinctly as to be understood, he is not in such case to make his testament.

What if it be doubted whether he is of perfect mind and memory.

Thirdly, If a man is at the point of death, and is hardly able to speak so as to be understood, and doth not of his own accord make or declare his testament, but at the interrogation of some other demanding of him, whether he make this or that person his executor? and whether he gives such a thing to such a person? answers, yes, or I do. In this case it is to be considered, whether the person that asks the testator these questions be a suspected person, or be importunate to have the testator speak, or asks such questions for his own advantage: As, do you make me executor? or, do you give me this or that? and thereupon the testator answers Yes: In this case it shall be presumed, that the testator answered yes, rather to deliver himself from the importunity of the party, than out of any intent to make his will; for it is generally painful to a man in that extremity either to speak or be spoke to. If a man makes a will in his sickness at the over importunity of his wife, to the end he may be quiet; this shall be said to be a will made by restraint, and shall not be good. *Styl. 427.* If the person who makes the motion be not any way suspected, and it also appears by some conjectures, that the sick person had a desire to make his will; as if the sick person send for his friend, who being come, asks him if he makes this or that man his executor, who would have had the administration of his goods if he had died intestate; and he answers, Yes, or I

Whether one at the point of death may make his testament at the motion of another.

If the person making such motion be a suspected person.

If he be not a suspected person, and the testator had a design to make a will.

person, and leave his wife and children destitute, and the wife or children persuade the testator that such person is dead, thereby deceiving the testator, and procuring themselves to be appointed executors and general legatees: This deceit is not looked upon as evil, and therefore the testament is not to be rejected as unlawful.

Fraud in a will relating to a personal estate examinable only in the ecclesiastical court.

The testator made his will, and thereby gave *Archer* the greatest part of his personal estate amounting to 5000*l.* but one *B.* his maid servant, had in his sickness prevailed on him to make another will, and to marry her a week before his death, when he lay on his sick bed at six o'clock at night, though it was really proved by two ministers, that she was a year before actually married to one *Mosse*, and was then his wife, and that *Mosse* procured the licence for the marriage of the testator to *B.* and this will being set up by *Mosse*, executor to *B.* though it appeared that there was as gross a practice as could be in the gaining the will, the testator being *non compos mentis* both at the time of making the will, and also at the time of the supposed marriage, and that in his health he knew that *Mosse* and *B.* were married, and that *B.* suppressed the first will; yet that will so set up, being proved in the prerogative court, and the matter in question relating only to a personal estate; the lord chancellor was of opinion, that whilst that probate stood, the matter was not examinable in chancery; and though the fraud was fully proved and opened to him, he would not hear any proofs read, but dismissed the bill. *Archer and Mosse*, 2 *Vern.* 89.

But a party claiming under such a will, shall have no aid in a court of chancery.

A will may be good at law, as being well exe-

Though a will gained by fraud, and proved in the spiritual court, is not to be controverted in equity; yet if the party claiming under such a will comes for equity in the court of chancery, he shall not have it. 2 *Vern.* 76.

A. by his will had devised his land to his mother in fee, and the mother was afterwards told by

J. S. that this will would not be good, but ought to be guarded, (as he called it) and that he would make another will for the testator which he would take care should be sufficiently guarded. Accordingly J. S. drew the will, which was so drawn, that A. thereby gave the land to his mother for life only; remainder to J. S. in fee. The mother on the death of A. brought a bill to establish the first will, and there were diverse witnesses examined to prove A. the testator *non compos* when he made his second will. Lord Chancellor: A will, though good at law, may yet be set aside in equity for fraud; as if A. should agree to give B. bank-bills to the amount of 1000*l.* in consideration that B. would make his will, and thereby devise his lands to A. And accordingly B. does make such a will, and A. gives B. the bank-bills, but those bank-bills prove to be forged: This, though a good will at law, shall nevertheless be avoided in equity by the testator's heir for the fraud. In like manner if A. had devised his lands to his mother in fee; and afterwards J. S. the defendant had told A. the testator, and not the mother, (as in the principal case) that the will was a void will for want of its being well guarded; and that he would make another will for the testator that should be effectually guarded; and accordingly he had made another will for the testator, whereby the land had been devised to the mother for life only, the remainder to J. S. (the defendant) in fee: This would be a good will in law, if attested pursuant to the act of parliament, but would be set aside in equity for the fraud; but as to the evidence of the testator's being *non compos*, that is intirely at law, and to be tried there. The court directed an issue in *Middlessex*, where the will was made, (though the lands lay in *Shropshire*) to try whether the will, by which the lands were devised to the mother in fee, was the last will of the testator. *Mich. 1715. Goss v. Tracey, Wil. Rep. 287. 2 Vern. 699, 700. Vide Ch. Rep. 12, 66.*

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Eq. Cas. Abr. 406. pl. 3. 2 *Eq. Cas. Abr.* 396. pl. 5, 6.

Whether fraud
in obtaining a
will of lands be
examinable in
equity.

It being urged, that a will concerning land is only triable at common law, and that the party there may take advantage of any fraud or imposition on the testator, and therefore not proper to be examined into, or set aside in equity, upon pretence of fraud or surprize; the lord chancellor held, that there might be fraud in obtaining a will that might be relievable in equity, and of which no advantage could be taken at law; as if a man agree to give the testator 2000 *l.* in bank-bills, if he will devise his estate to him, and on the delivery of such bills, makes his will, and devises his estate him, and the bills proved to be forged or counterfeited. 2 *Vern.* 700.

Will gained by
fraud, not to be
set aside in
equity.

It was said by lord commissioner *Jekyl*, that there was a difference betwixt a deed and a will gained from a weak man, and upon misrepresentation or fraud; For if a will be gained from a weak man by false representation, this is not a sufficient reason to set it aside in equity; as was determined in the case of the late duke of *Newcastle's* will, between lord *Thanet* and lord *Clare*, and in the case of *Bodvil* and *Roberts*; but where a deed (which is not revocable as a will) is gained from a weak man upon a misrepresentation, and without any valuable consideration, the same ought to be set aside in equity. *Pas.* 1725. *James v. Greaves*, 2 *Wil. Rep.* 270. See *Eq. Cas. Abr.* 406. *Vern.* 700.

But at law,

But it was decreed in the house of lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must be tried at law on *devisavit vel non*, being a matter proper for a jury to examine into. 28 *July* 1728. *Bransby* and *Kerridge*, 8 *Vin. Abr.* 167. pl. 11. in notes, *Eq. Cas. Abr.* 133. pl. 19. 406. pl. 4.

Fraud in obtain-
ing a will of a

A bill was brought to set aside a will relating to a personal estate only, and to stay the probate thereof

thereof; setting forth, that the will was gained by fraud and by misrepresenting the plaintiffs, who were the half brothers and sisters of the testatrix, and alledging, that the will was falsely read to her, and setting forth diverse instances of fraud on the part of the defendants in procuring this will. The defendants, as to that part of the bill which sought to set aside the will and to stay the proceeding, demurred to the jurisdiction of the court, for as much as upon the face of the bill it appeared, that the plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them. After which motions were made before the lords commissioners and lord chancellor King for an injunction; for that the demurrer confessed the fraud, and fraud was cognizable in equity as well as in the spiritual court. *Cur. Contra.* The spiritual court has jurisdiction of fraud relating to a will of a personal estate, and can examine the parties by allegation touching this fraud; and if the will was falsely read to the testatrix, then it is not her will. *Trin. 1725. Stephenson v. Gardiner, 2 Wil. Rep. 286. 2 Eq. Abr. 79. pl. 3. Vide of Plume and Beale, Wil. Rep. 389. 2 Eq. Cas. Abr. 421. pl. 1.* The like resolution in the case of a forged legacy.

C H A P. III.

Of Devises of Lands and Tenements. What Words shall pass a Fee-Simple; what an Estate-Tail. Of Executory Devises. Contingent and Cross Remainders. Executory Devise of a Term, and of the Limitation of the Trust of a Term. Incertain Devise. Devises by Implication. Implied Trusts for the Heir. Devises of Lands for Payment of Debts. Devises upon Condition. Void Devises, as against Law; 1. By Incertainty in the Thing devised. 2. By Incertainty in the Devisee. 3. By the Devisee's dying in the Life-time of the Testator. Of Devises of Copyhold Lands.

Lands not devise-
able.

AT the common law lands and tenements were not deviseable by any last will or testament.

Unless by custom
in boroughs.
Lands deviseable
by the Stat. 32
H. 8. c. 1.

But by certain private customs in some boroughs, they were deviseable.

By the statute 32 H. 8. c. 1. a man might devise all his lands holden in socage, and two parts of his lands holden by knights service.

Stat. 12 Car. 2.
c. 25. sect. 1.

And by the Stat. 12 Car. 2. c. 25. sect. 1. all tenures are turned into free and common socage.

Whether, when
the testator is
disseised of the
land, the devise
shall be void,

As to what estate the deviser must have in the lands devised, if a stranger disseises the deviser, and the deviser dies before re-entry, the devise is void. 39 H. 6. 18. b. But if he re-enters, the devise shall be good. 1 Salk. 238. If the testator devises land to his youngest son, and the eldest son knowing of the devise, disseises his father, and the father dies before he re-enters, whereby

whereby the devise is void; yet as it was made void by deceit and covin, it shall be made good in Chancery, *Refwell and Emery, Roll, Ab. 378.*

If a man devises lands in which he hath nothing, and afterwards purchases these lands, the devise is void, not being within the statute of wills, for he was not a person having lands, &c. *Plowd. 348.* Devise of lands which the devisor has not, but afterwards purchases, void.

A man devised to his wife all such sums of money, lands, tenements and estates whatsoever, whereof, at the time of his death he should be possessed; after the making the will he purchased lands of the custom of gavel-kind, and died without making any new publication of his will. It was held, that these lands did not pass, for they were not his lands at the time of making the will; and the constant form of pleading is, that the testator was seised, and being so seised, did, &c. which at least is an evidence of the law; and there is no difference as to lands devisable by custom or by statute: But such a devise of chattels personal is good, tho' the testator had them not at the time of making his will, because they go to the executor, and pass not by the will, but by the assent of the executor to whom the will is only directory. *Bunter and Coke, Salk. 237, 238.* Devise of all lands he shall have at time of his death; lands purchased after the will pass not. 11 Mod. 126.

If a man deviseth a term for years, which he hath not at the time of the devise, but purchaseth some time before his death, *Holt* chief justice doubted, whether this would be good. But Mr. *Peere Williams* says, that notwithstanding the doubt which the court of *King's Bench* seems to have been in that case, it has been clearly held to pass by such will. *3 Will. Rep. 169.* Aliter as to chattels personal.

Amery articulated with *Pollard* for the purchase of lands, and before any conveyance executed, he devised all his lands to be sold for the payment of his debts and legacies; these lands will pass, although he was not seised at the time of the will, and though there was no new publication of the will, Devise of lands for payment of debts, after purchased lands pass.

will. Also if a man devises all his lands for payment of his debts, and afterwards purchases land and dies, equity will decree a sale of the purchased lands, although there were no precedent articles.

Prideaux and Gibben, 2 Chan Ca. 144.

A devise of copyhold lands after the purchase, but before admittance, good.

If a man purchases copyhold lands, and dies before admittance, having devised all his copyhold lands to *J. S.* the copyhold land contracted for, will pass by the will; for the testator had an equity to recover the land, and the vendor stood trustee for the testator, and as he should appoint, till a conveyance executed. If upon articles for a purchase, the purchaser die, having devised the land before a conveyance executed, the land will pass in equity. *Davie v. Beardsham, Chan. Cas.*

39.

A devise of lands articulated for, but before conveyance, good.

A. employed *B.* to article for the purchase of lands, which *B.* did, and the purchase-money was paid. *A.* afterwards, but before any conveyance, devised the lands to *J. S.* *A.* after that took a conveyance of the lands to himself and his heirs, and died. It was held, that the lands passed by the will, and that a man might devise an equitable interest as well as a legal interest. *Greenbill and Greenbil, 2 Vern. 679.*

A mere possibility not devisable.

A meer possibility is not devisable. A man devised lands to trustees, in trust to pay his debts and till his debts paid to pay *M.* 100 *l.* per annum; and after his debts paid, 300 *l.* for life; and if she should have any children, to convey to those children; but if she died without issue, then to convey to the eldest son and heir of *J. C.* and the heirs of such eldest son; but if he claim any thing during the life of *M.* then both father and son to be excluded from having any thing in the estate. The eldest son of *J. C.* was *A.* who had two sisters *B.* and *T.* *A.* died leaving issue *J.* who in the life-time of *M.* devised the lands in question to *J. S.* and died without issue; after the death of *M.* without issue, the trustees conveyed to *B.* and *T.* And it

was

was held, that they were well intituled to the lands, and that the devise to *J. S.* being a mere possibility during the life of *M.* was void. *Bishop and Fountain, 3 Lev. 427, 428.*

As to what words will pass a fee-simple in a will. If a man devise 20 acres of land to another, and that he shall pay to his executors 10*l.* for the same, the devisee hath a fee-simple by the intent of the deviser, although it be not to the full value of the land. So it is, if a man devise land to another *in perpetuum*, or to give and to sell, or *in feodo simplici*, or to him and his assigns for ever. But if a devise be to a man and his assigns, without saying *for ever*, he hath but an estate for life. If a man devise land to one & *Sanguini suo*, that is a fee-simple; but if it be *Semini suo*, it is a fee-tail. *Inst. 9. b. Benl. 11. Rol. Ab. 834.*

What words shall pass a fee-simple in a will.

A devise to a man and his successors carries a fee; for by the word *successors* is intended heirs, *quia hæres succedit patri. Cro. Jac. 416. 1 Rol. Ab. 835.*

To a man and his successors.

If a man devise by these words: *I release all my lands to A. and his heirs*; *A.* has a fee-simple: The law dispenses with the form in a will where the intention of conveying appears. *Benl. 30.*

A devise by the word release.

I appoint that *J. S.* shall have my inheritance, if the law allows it, or that *J. S.* shall be heir of my lands; these words are sufficient to create a fee. *Hob. 2. Moor 873. Godb. 207. 3 D. A. 176. p. 17.*

That *J. S.* shall have my inheritance.

A devise of lands to *A.* for life, and after his decease, the whole remainder of those lands to *B.* *B.* has a fee in the remainder. *Norton and Ladd, Lut. 762.*

The whole remainder after an estate for life.

A devise of lands to trustees, without any words of limitation, to support the trust of an estate of inheritance; the trustees by implication have an estate of inheritance sufficient to support the trust; for there is no difference between a devise to a man for ever and a devise to a man upon a trust that may

To trustees to support an estate of inheritance.

may endure for ever. *Pas. 1 Geo. 2. Shaw and Wright.*

The word *paying* creates a fee.

If *A.* devises land to *B.* for life, remainder to *C.* paying several sums in gross, *C.* hath a fee, though all the sums together do not amount to the annual rent of the land; for the devise shall be intended for his benefit; for if he had only an estate for life, he might die before he could receive the legacies out of the land, and consequently be a loser; for where there is a sum in gross to be paid, then the devisee hath a fee, though the sum be not to the value of the land. *Collier's case, 6 Co. 16. Cro. Eliz. 378. Cro. Jac. 527. Cro. Car. 158. Inst. 9. b. 5 Co. 21. Bendl. 15. 2 Lev. 249. 2 Salk. 685.*

Paying so much out of the profits where the devisee can be no loser, only an estate for life.

But if *A.* devises lands to *B.* paying so much, or such sums out of the profits of the lands, the devisee takes but an estate for life; for although he takes the land charged, yet he is to pay no further than he receives, and so can be no loser. *6 Co. 16. 2 Mod. 25. Vide 2 Vern. 106.* So if the devise had been to *B.* paying an annual sum to another, this had been an estate for life; for he may pay this out of the yearly profits without any loss to himself. *Vide Cro. Car. 158. Jones 211. Bulst. 194. Cro. Car. 416. Cro. Jac. 527. 2 Vern. 687, 564.*

All my estate.

The testator being seised of freehold and copyhold lands, devised all the rest of his estate, whether freehold or copyhold to his wife and children, equally to be divided amongst them; it was held, that the word *estate* must signify the interest he had in the land, and so pass a fee. *Carter and Horner, 4 Mod. 89. Vide Stile 281. 2 Lev. 91. Mod 100. 2 Cha. Ca. 262.* The testator devised *all his estate real and personal*: It was held, that fee-farm rents passed by these words; for the word *estate* is *genus generalissimum*, and includes all things real and personal. *Countess of Bridgewater, and duke of Bolton, 1 Salk. 236. I give all*

All my lands and estate,

will my lands and estate in U. in Northamptonshire to W. E. the devisee has an estate in fee, but held clearly, that a devise of all my lands would only give an estate for life. *Past. 1729. Barry and Edgworth.*

All my lands.

The testator was seized of B. acre in fee by mortgage, which was forfeited, and of W. acre as of his own inheritance, and devised W. acre to his brother, and all the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods, whereof he was possessed, after debts and legacies paid, to his wife: It was held, that this was no devise in fee to his wife of the mortgaged land, the word estate is coupled here with chattels, and the words, whereof he was possessed, shew that he intended only to give her chattels and the mortgage money, and not the inheritance of the land. *Wilkinson and Merryland, Cro. Car. 447. Rol. Abr. 894.*

How if the word estate be coupled with chattels.

As to what words will pass an estate-tail in a will.

Words in a devise creating an estate-tail.

The intent of the deviser will supply those words that are necessary in conveyances at the common law; as if lands are devised to a man and his heirs male, the law will give him an estate-tail, and supply the words of his body. A devise to one *et Semini suo* creates an estate-tail; but a devise cannot direct an inheritance to descend contrary to the rules of law; and therefore if A. devises to B. and his heirs male, though this is an estate-tail, yet if B. hath issue a daughter, who hath issue a son, he shall not inherit; for the rule is, whoever claims as heir in tail male, must convey his descent wholly by heirs male. *Inst. 9. b. 25, 271. Hob. 33. Vent. 288.*

To a man and his heirs male, without saying of his body.

To a man et Semini suo.

If lands are devised to one, and if he die before issue, or if he depart, not leaving issue, or if he die, not having a son, all these limitations create an estate-tail. *2 Vent. 766.* So if lands are devised by these words; And if it please God to take my

To a man, and if he die not having a son

son R. before he shall have issue of his body, so that the lands descend to his brother, this is an estate-tail in

R. Owen 29.

To one and the heirs male of his body for 500 years, with proviso not to alien.

A man devised to his eldest son, and the heirs male of his body for the term of 500 years; provided, that if he, or any of his issue male alien the premisses, then to remain over; this is an estate-tail, and the limitations for 500 years void: The testator's intent was, that it should be an inheritance, because by the proviso he took care to advance the issue of the devisee; if it should be a term, by the descent of the inheritance on the devisee, the term would be merged; and the issue would be unprovided for, for the devisee might alien the estate. 10 Co. 88. Moor 772.

To two, and that one shall be heir to the other, if either die without issue.

Wentworth 100. 11 Co. 100. 12 Co. 100. 13 Co. 100. 14 Co. 100. 15 Co. 100. 16 Co. 100. 17 Co. 100. 18 Co. 100. 19 Co. 100. 20 Co. 100. 21 Co. 100. 22 Co. 100. 23 Co. 100. 24 Co. 100. 25 Co. 100. 26 Co. 100. 27 Co. 100. 28 Co. 100. 29 Co. 100. 30 Co. 100. 31 Co. 100. 32 Co. 100. 33 Co. 100. 34 Co. 100. 35 Co. 100. 36 Co. 100. 37 Co. 100. 38 Co. 100. 39 Co. 100. 40 Co. 100. 41 Co. 100. 42 Co. 100. 43 Co. 100. 44 Co. 100. 45 Co. 100. 46 Co. 100. 47 Co. 100. 48 Co. 100. 49 Co. 100. 50 Co. 100. 51 Co. 100. 52 Co. 100. 53 Co. 100. 54 Co. 100. 55 Co. 100. 56 Co. 100. 57 Co. 100. 58 Co. 100. 59 Co. 100. 60 Co. 100. 61 Co. 100. 62 Co. 100. 63 Co. 100. 64 Co. 100. 65 Co. 100. 66 Co. 100. 67 Co. 100. 68 Co. 100. 69 Co. 100. 70 Co. 100. 71 Co. 100. 72 Co. 100. 73 Co. 100. 74 Co. 100. 75 Co. 100. 76 Co. 100. 77 Co. 100. 78 Co. 100. 79 Co. 100. 80 Co. 100. 81 Co. 100. 82 Co. 100. 83 Co. 100. 84 Co. 100. 85 Co. 100. 86 Co. 100. 87 Co. 100. 88 Co. 100. 89 Co. 100. 90 Co. 100. 91 Co. 100. 92 Co. 100. 93 Co. 100. 94 Co. 100. 95 Co. 100. 96 Co. 100. 97 Co. 100. 98 Co. 100. 99 Co. 100. 100 Co. 100.

The testator having two sons B. and C. devised Black acre to B. and his heirs, and White acre to C. and his heirs; and further willed, that the survivor of them should be heir to the other if either of them died without issue. Though the first words were sufficient to pass an estate in fee, yet the subsequent words corrected them, and pass only an estate-tail, and the remainder in fee was not contingent, but executed, each son being tenant in tail of the part to him devised with the remainder over to the other. Cro. Jac. 695.

To one, and if he die without issue, having no son, then remainder over.

A man devised lands to his wife for life, and after to her son J. S. and if he died without issue having no son, then the remainder over. This is an estate in tail male; for though the devise to the son, and if he die without issue, had been a tail general, yet when the deviser went further and said, having no son, he thereby explained what issue he intended should inherit the land. Rol. Ab. 837.

When heirs must be intended heirs of the body.

The testator devised lands to his wife, if she did not marry; and if she did, then his eldest son presently after her decease, to enter and hold the lands to him and the heirs male of his body; the remainder to his other sons in tail: The wife did not

not marry, yet the court resolved, that the lands were intailed by the will, taking the intent of the devisor to be, that the intail should be created at all events, but that the eldest son should not enter till after the death of the wife; unless she married, and then to enter presently. *Luxford and Cheek, 3 Lev. 125.*

The testator devised to a man and his heirs, and if he died without issue, that then the land should go to A. and B. or the survivor of them: The first devisee had an estate-tail, for in these cases the extent of the word *heir* is confined to the descendants or issue of the devisee, since otherwise the limitation over cannot vest according to the intent of the devisor; for they will not allow a limitation of a fee upon a fee. *1 Rol. Ab. 836. Moor 864. Hob. 75. Poll. 487. Cro. Jac. 448.*

To a man and his heirs, and if he die without issue.

A man devised lands to his son, and if the testator's daughter survived the son and his heirs, then she should have his lands: The son had but an estate-tail, for the word *heirs* must be intended heirs of his body, for he would not die without a collateral heir whilst his sister was alive: But if the devise over had been to a stranger, then the son would have had a fee-simple, and the remainder would have been void; for it was to vest on a contingency of the son's dying without heirs, which is too distant to expect, and the whole fee-simple being in the son, there was no present interest to vest in a stranger. *Cro. Jac. 415, 416. Salk. 233. Parker and Thacker, 3 Lev. 70. 7 Co. 4. Forester's Rep. 1.*

When heirs must be intended heirs of the body.

A devise to a man *in perpetuum*, and after his decease, remainder to his heir male in the singular number, is an estate-tail; for *heir est nomen collectivum*. *Bulst. 219.*

To a man and his heir male.

A man devised land to B. for his natural life, and after his decease he gives the same to the issue of his body lawfully begotten on a second wife, and for want of such issue, to J. S. and his heirs

A devise to A. for life, and after his decease, to his issue, is an estate-tail.

for

for ever: Provided, that *B.* may make a jointure of all the premisses to such second wife, which she may enjoy during life. This is an estate-tail in *B.* for the word issue *est nomen collectivum*, and takes in the whole generation. *King and Malling, Vent. 225. 2 Lev. 58.*

When a devise to a man and his issue shall be for life or in tail, If lands are devised to a man, and after his decease to his children, he then having children, he has but an estate for life. If lands are devised to a man and his children or issue, he having issue at the time of the devise, he has but an estate for life jointly with his children; but if he had no issue at the time of the devise, he takes an estate-tail; for it was the intent of the deviser, that the children should have the land, and they cannot take as devisees, because they were not *in esse*, nor by way of remainder, for the devise was immediately to him and his children, and they shall be taken as words of limitation, *viz.* as children of his body. *Wild's case, 6 Co. 17. b.*

Whether by a Devise to A. for life with a limitation to the heirs of his body, he shall take an estate-tail. Though an express estate for life is given to the ancestor, with a limitation, to the heir or heirs of his body, or his issue, yet regularly the ancestor takes an estate-tail according to the rule laid down in *Shelley's case, Co. 99. viz.* That where the ancestor takes an estate of freehold, a limitation to his right heir or heirs of the body, are words of limitation and not of purchase.

Exception and where the heir shall take by purchase. A devise to *A.* for life, and afterwards to the next heir male, and the heirs of the body of such heir male; *A.* has but an estate for life, for the inheritance is limited on the estate of the heir in the singular number, and therefore he shall take by purchase. *Archer's case, Co. 66.*

Devise to A. for ever, and after his decease to his heir male, is an estate-tail. The deviser devised to *A.* his son for ever, and after his decease, the remainder to his heir male for ever, with other remainders over, *A.* has an estate-tail; for though the first devise, which was for ever, would give a fee-simple, yet the subsequent words, to his heir male, shew what sort of inheritance

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tance the devisor intended him; and the word *heir*, being *nomen collectivum*, is sufficient in a will to create an inheritance. *Bulst.* 219. *Rol.* 836.

A devise of lands to *A.* for life, without impeachment of Waste, and in case he should have issue male, to such issue male and his heirs for ever; and after the death of *A.* in case he leaves no issue male, the remainder over, *A.* had but an estate for life,

1. Because it was devised to him expressly for life, and that without impeachment of waste, which would have been needless if it had been an estate-tail. 2dly, The words *and in case A. die without issue male, or leave no issue*, are not to be taken substantially and absolutely, but relative to what was said before, *viz.* if *A.* shall die without issue, who shall take the fee as before is appointed.

Loddington and Kime, 3 *Lev.* 431. *Salk.* 224.

The testator devised his lands to trustees and their heirs, in trust for *A.* for life, and to his first and other sons in tail; but in case *A.* died without an heir male of his body begotten, the trust to be void, and in such case he gave the estate to another; it was held, that these words, *if he die without heir male of his body begotten*, did not give an estate-tail by implication, nor enlarge an express estate devised to him for life. *Bamfield and Popham*, 2 *Vern.* 427, 449. *Salk.* 236. 2 *Eq.*

Abr. 308. *pl.* 12. *Wil. Rep.* 54. *pl.* 10.

A man by will devised lands to his son for life, without impeachment of waste, remainder to trustees during life, to support contingent remainders, with remainder to the heirs of the body of the said son, reversion to himself in fee, with a power to his son to make a jointure: It was held, that the son took only an estate for life, as the words were express, and had all the other marks attendant on an estate for life, and consequently, that the heirs of his body should take by purchase; and though the estate would vest in the first son as tenant in tail by way of purchase, yet not so as

Devise to *A.* for life sans waste, and in case he shall have issue male, to such issue in fee, in case he leave no issue, remainder over, is an estate for life.

Devise to *A.* for life, remainder to his first and other sons in tail; and if *A.* die without an heir male of his body, remainder over. *A.* has but an estate for life.

Devise to the son for life sans waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of his body, remainder to the devisor in fee; the son has but an estate for life.

to exclude the other sons or their issue from taking the like estate whenever his estate determined for want of issue. *Mich.* 1728. *Papillon and Voice*, vide *Fitzgibbon* 38. 2 *Wil. Rep.* 471. *Eq. Cas.* *Abr.* 185. 2 *Kel.* 27. See *Sch. Cas. in Chanc.* 27, 34.

Of Executory Devises, Contingent Remainder, Cross Remainder, &c.

Of executory devises, contingent and cross remainders by devise.

A Fee cannot be limited on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, that it shall remain over to another; the last limitation is void. If lands be given by deed to one and his heirs so long as *J. S.* hath issue, and after the death of *J. S.* without issue, remainder over to another, this remainder is likewise void, because the first devisee had a fee, though a base and determinable fee. *Dier* 41. *a.* *Brook* 234. *Co.* 83. *b.* *Bulst.* 195. *Plowd.* 29. 2 *Leon.* 69. *Inst.* 18. *a.* *Poph.* 34. 2 *Rol. Rep.* 220. *Godolph.* 355. But in a will such a limitation may be good, upon a contingency that may happen within the compass of a life or lives *in esse*, or a reasonable number of years, and this not by way of direct remainder, but by way of executory devise. *Cro. Eliz.* 205. *Rol. Ab.* 626. *Dier* 124. An executory devise is a future interest, which cannot vest at the death of the testator, but depends upon some contingency which must happen before it can vest, of which there are three kinds, *viz.* 1. Where the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee upon that contingency, and this is new in law. 2. Where the devisor gives a future interest to arise upon a contingency, but does not part with the fee at present, but suffers it to descend to his heir as a devise, till his debts be paid, &c. to the heir of *J. S.* when he

he shall have one; and these have been frequent; but if an estate be limited upon a contingency after a particular estate capable of supporting a remainder, it shall then be construed a contingent remainder, and not an executory devise. 3. Are leasehold interests or terms for years.

If a man had devised to one in fee upon condition, and if he failed in performing the condition, his estate to cease, and to remain to another; this estate was formerly held to be void, *Dier* 33. a. because a remainder could not be limited upon a fee; the first devise carrying a fee; nothing further remained to be disposed of; and as to the condition, the heir and not the second devisee should take advantage of it; but the contrary of this case first received a solemn determination in the case of *Hind and Lyon*.

Sir *John Lyon* devised the manor of *D.* to his wife until his son and heir should come to the age of twenty-four years, and that at the age of his son of twenty-four years, his wife should have the third part of the said manor for her life, and his son should have the residue; and that if the son die before he come to the said age of twenty-four years without heir of his body, the land should remain over to *J. S.* the remainder over to another; the deviser died, the son came to the age of twenty-four years; the question was, if the son had an estate in tail; and it seemed to *Dyer* and *Manwood* that here was not any estate in tail; for no tail was to rise, unless the son died before his said age; and therefore the tail never took effect, and the fee-simple doth descend and remain in the son unless he dieth before the age of twenty-four years, and then the estate-tail vests with the remainder over: And now having attained the said age, he hath the fee-simple. *Mich.* 19 *Eliz.* *Hind* and *Lyon*, 2 *Leon* 11. 3 *Leon*. 64, 70.

Devise to the wife till the son attain twenty-four, and then one third to the wife, and the residue to the son; and if the son die before twenty-four without heir of his body, remainder over. The son attaining twenty-four has a fee; if he had died before twenty-four without heir of his body, the remainder over had been good.

William Brown having 3 sons, *William*, *Thomas*, and *Richard*, devised land to *Thomas* his second

Devise to T. and his heirs for ever, and if he die son without issue

living W. then W. to have the land. T has a fee, and W. takes by way of executory devise, which is not to be barred by a recovery.

son and his heirs for ever, paying to his brother *Richard* 20 l. at his age of 21. And if *Thomas* died without issue, living *William*, then *William* to have the land to him and his heirs for ever, paying the 20 l. as *Thomas* should have done; *Thomas* suffers a common recovery with single voucher to the use of himself and his heirs. Resolved, 1. This is not an estate-tail but a fee in *Thomas*, for it is to him, and his heirs for ever, and paying, &c. and the words, *if he die without issue*, are not absolute and indefinite, but if he dies without issue, leaving *William*. 2. This is a good limitation by way of contingency, but could not be by way of remainder, because one fee cannot be in remainder after another; for the law does not expect the determination of a fee by dying without heirs, but by way of contingency and executory devise to determine one estate and limit another. 3. *William* is not barred by the recovery, for *Thomas* had a fee, and *William* only a contingency, which the recompence goes not to, except he had been vouched; for then by entering into the warranty, he gives all his possibility. *Pell and Brown, Cro. Jac. 590. Bridgm. 1, 3 Palm. 131. 2 Rol. Rep. 196, 216. Godb. 282. 2 Leon. 111. Vaugh. 272. 2 D. A. 518. p. 9. 3 D. A. 179. p. 2. 2 Rol. Ab. 394. p. 5.*

Devise if my son G. and daughters C. and M. die without issue, then to W. R. W. R. takes by way of executory devise,

My will and meaning is, that if my son *George*, and *Catherine* and *Mary* my daughters happen to die without issue of their bodies lawfully begotten, all my freehold lands whereof I am now seised shall come, remain, and be to my nephew *William Rose* and his heirs for ever. Resolved first, that *George* and the daughters took no estate, for there is no implicit devise to them: But *William* took by way of executory devise after the deaths of the son and the daughters without issue; and in the interim the estate descends upon the heir, and it is no remainder, because no particular estate created. *Gardiner and Sheldon, Vaughan 259. 2 Keb. 781.*

A man, having two sons and a daughter, devised to his youngest son and his daughter 20*l.* a-piece, and devised his lands to *A.* his eldest son in fee, upon condition, that if he paid not the legacies, then the youngest son and daughter to have the land. This is an executory devise to them upon failure of payment by *A.* and the devise to *A.* is void, being no more than what the law gave him. *Hainfworth v. Pretty, Cro. Eliz. 919. Moor 644. Noy 7, 51. 2 D. A. 9. p. 3. 558. p. 13.*

Devise of land to the eldest son upon condition he paid a legacy to the youngest son, and in default, the land to the youngest son: This an executory devise to the youngest son.

One by will devises lands to his mother for life, and after her death, to his brother in fee; provided, that if his wife (being then *ensient*) should be delivered of a son, then the land should remain to him in fee; he dies, and the son is born; it was held that the fee of the brother should cease, and vest in the son by way of executory devise upon the happening of the contingency. *Dier 127. in Margine.*

Devise to the mother for life, remainder to the brother in fee, provided if a son be born, remainder to him: This an executory devise to the son.

One devised lands in *D.* to *A.* his daughter and heir, and her husband and her heirs, upon condition, that they should assure lands in *F.* to his executors and their heirs, to perform his will, and if they failed, then he devised the said lands in *D.* to his executors and their heirs, and died. This was adjudged to be no condition; for then by the descent to the daughter being heir, it would be destroyed; but it was held a limitation or executory devise to the executors, in case the assurance was not made, and that they might for breach thereof enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may, and enures as a new original devise, to take effect when the first devisee failed to make the assurance. *Dier 33. a. in margine. Palm. 135. Cro. Jac. 592. Cro. Eliz. 359.*

Devise to the heir in fee upon condition to assure other lands to the executors, and on failure devise to the executors in fee. This an executory devise to the executors.

A man devises lands to his wife till his son came to the age of twenty-one years, and then that his son should have the lands to him and his heirs; and if he dies without issue before his said

Devise to the wife till the son attain twenty-one; then to the son in fee; and if he die without issue be-

fore twenty-one, age, then to his daughter and her heirs : This is a good contingent or executory devise to the daughter if the contingency happens, and in the mean time the fee descends to the son as heir ; and if he lives to twenty-one, and dies without issue, or dies before twenty-one and leaves issue, yet the daughter is not to take the lands, because he is to die without issue, and before twenty-one, or else the daughter takes nothing. 2 *Rol. Rep.* 197, 217. *Palm.* 132.

But where a man devised to *A.* his son, and the heirs of his body after the death of *B.* his wife ; and if *A.* die in the life-time of *B.* then *William* his brother to be his heir, and *A.* dies in the life-time of *B.* leaving issue *C.* It was resolved, that the words of the will should be expounded thus ; And if *A.* dies without issue in the life-time of *B.* then, &c. and the rather, for that in case all his sons had died without issue, he had limited his lands over ; so as this shall not be taken as a contingent limitation to controul or abridge the express limitation before. *Spalding and Spalding, Cro. Car.* 184. 3 *D. A.* 182. p. 20.

Devise to *C.* eldest son of *B.* in fee, but if he die before 21, to the right heirs of *B.* in fee ; *C.* dies under 21, then *B.* dies, *D.* the next son of *B.* shall take by way of executory devise.

A man having a sister who was his heir, and had issue *A.* and afterwards married *B.* and by him had issue *C.* and *D.* devised lands to his sister until *C.* should attain twenty-one, and after *C.* attained twenty-one, to *C.* and his heirs ; and if *C.* died before twenty-one, then to the heirs of the body of *B.* and their heirs, as they should attain their respective ages of twenty-one, and dies. *C.* dies before twenty-one, living *B.* and after *B.* dies : *D.* either as heir of *C.* in whom the fee was vested, or as heir of the body of *B.* (though he could not be so during the life of *B.*) being of age at the death of *B.* shall have the estate by way of executory devise, and not the right heir of the devisor. *Taylor and Biddulph, 2 Mod.* 289. 2 *D. A.* 520. p. 18.

If

If *A.* has issue two sons *B.* and *C.* and devises lands to *B.* for life, and if he dies without issue living at his death, that then the fee shall remain to the heirs of *B.* for ever, by which devise *B.* has only an estate for life, the remainder to his heirs not executed; and though the reversion descended on *B.* as heir of *A.* yet it drowned not the estate for life against the express devise and intention of the will, but left an opening, as it was termed, for the interposition of the remainder when it should happen to interpose between the estate for life and the fee; and that this being a contingent remainder, and not an executory devise, was barred by a recovery suffered by *B.* *Holmes and Plunket, Lev. 11. Raym. 28. Sid. 47. 1 Keb. 29, 119.*

The testator devised lands to his wife for life, remainder to his second son *Daniel* in fee; provided, that if his third son *Nathaniel* should within three months after the death of the wife pay 500*l.* to *Daniel*, his executors, &c. then he devised to *Nathaniel* in fee; *Nathaniel* died in the life-time of the wife, and afterwards the wife died. It was held, that the heir of *Nathaniel* should be allowed to perform the condition by paying the money; and though, before the case of *Loyd and Carrew*, it seems to have obtained for law, that no executory devise of a fee upon a fee should be allowed of, unless upon a contingency to happen during the life of one or more persons in being at the time of the devise, and consequently the limitation to *Nathaniel* would have been void, because dependant upon a contingency to happen within three months after the death of the wife; yet since that case, which went through the house of lords, and is reported *Shower's Cases in Parliament* 137. and *Præcedents Chancery* 106. the law is now settled, that in case of a contingency that cannot in the nature of it precede the death of a person,

Devise to the wife for life, remainder to *D.* in fee, provided if *N.* within three months after the death of the wife pay 500*l.* to *D.* then to *N.* in fee.

a reasonable time may be allowed subsequent to the decease of that person for performance of the condition, and a fee limited thereupon is good. In that case a year was held no unreasonable time; *a fortiori* not three months, which is the present case. *Mich. 5 Geo. 1. Marks and Marks, Lucas's Reports 419 Prec. Ch. 486.*

Devise to the wife for life, and if she had a son, to such son, if called by the testator's name and surname; and if he died before 21, to the testator's heirs. This is a contingent remainder, and destroyed by the bargain and sale of the heir of the testator to the tenant for life before a son born.

Sampson Skelton devised to *Isabel* his wife for life, and if she should have a son, and cause him to be called by his name and surname, namely, *Sampson Skelton*, then to such son after his mother's life; and if he died before twenty-one, then he gave the land after his wife's death to his own heirs for ever. The devisor died, and *Isabel* his widow married *Richard Broughton*; *John Skelton* the brother, and heir of the devisor, by deed of bargain and sale inrolled bargains, sells, releases, and confirms the premisses to *Richard* and *Isabel* and their heirs; *Isabel* hath a son by *Richard*, whom she caused to be baptized *Sampson Skelton*, and after this *Richard* and *Isabel*, by bargain and sale and fine, convey to *Weston*: It was held, that was a good devise by way of contingent remainder, and not by way of executory devise; for when a contingent estate is limited, and depends upon a freehold which is capable of supporting a remainder, it shall never be construed an executory devise, but a contingent remainder: And it was adjudged, that by the bargain and sale of the heir of the devisor before the birth of the son the contingent remainder was destroyed. *Purefoy and Rogers, 2 Saunders 380. 2 Lev. 39. 3 Keb. 11. 2 D. A. 520. p. 17.*

Devise to B. the eldest son, for 50 years, if he lived so long after the term, remainder to his heirs male, remainder to C. the youngest son; the

The testator being seised in fee, and having two sons *B.* and *C.* devised to *B.* for fifty years, if he should so long live, and the inheritance after the said term, to the heirs male of the body of *B.* and for default of such issue, then to *C.* Resolved, 1. That *B.* had not an estate-tail by implication upon

upon the words *without issue*; because the devisor had by exprefs words given him an estate for years, and the court cannot make a construction against exprefs words *to drown the estate for years*, and make an estate of inheritance. 2. That the devise to the heirs male of the body of *B.* was void in its creation, for want of an estate of freehold to support it, and the court seemed not to think it an executory devise, because it was limited as a remainder, and because it is limited *per verba in presenti*; for a devise to the heir of *J. S.* and *J. S.* is living, shall not be construed an executory devise, and is therefore void; but if it was to the heir of *J. S.* after the death of *J. S.* it is good as an executory devise. 3. The limitation to the heirs of *B.* was become void by the event, whatever it was in its creation, because he is now dead without issue. 4. That if the limitation to the heirs male of *B.* was void in point of limitation, the next remainder limited to *C.* took effect presently. *Goodright and Cornish, Salk. 226. 4 Mod. 255. 3 D. A. 337. p. 4.*

A devise of lands to the executors till the son should come of age, and when the son should come of age, then he should enjoy it to him and his heirs: This a good remainder executed in the son, and not in contingency; for the words *when* and *then* in this case only denote the time when the remainder is to vest, and will no more make the remainder contingent than in the common case when a lease is made for life or years, then to remain to another. Where words refer to what must needs happen, there shall be no contingency. *Boraston's Case, 3 Co. 19.*

remainder to the heirs male of *B.* void, and not good as an executory devise.

Devise to executors till the son comes of age, and then to the son in fee, is a vested and not a contingent remainder.

A devise of one house to the eldest son and his heirs, of another to the second son and his heirs, and of another to the third son and his heirs; provided, that if all the said sons die without issue, then the houses to remain to *M.* the wife and her heirs: *Per Doderidge, Houghton and Chamberlain,*
the

No cross remainders by implication between three or more.

the sons have an estate-tail, and the feme takes after their several deaths without issue; and here are no cross-remainders, because the houses are devised to them severally by express limitation, and so they cannot take any larger estate by express limitation. *Doderidge* said, that though perhaps a cross-remainder may be where a devise is to two, yet it cannot be by implication where the devise is of three or more several houses to three or more several persons, because where none dies, there cannot be several estates by moieties to several persons, and after when the second dies, to have the remainder again to another. *Gilbert and Witty Cro. Jac. 655. 2 Roll. Rep. 281. 3 D. A. 238. p. 2. Vide Vent. 224.* where *per Hale* chief justice no cross remainders can be created by implication in a deed, nor any in a will between three or more, unless the words in a will do plainly express the intent of the deviser to be so; as where *Black acre* is devised to *A. White acre* to *B.* and *Green acre* to *C.* and if they die without issues of their bodies *vel alterius eorum*, then to remain by reason of the words *alterius eorum*, cross remainders shall be. *Sed vide Dier 303, 304. Hob. 34, 75.*

Cross remainders
between two.

The testator devised his lands in *D.* to his son *Thomas*, and his heirs; and his lands in *S.* to his son *Richard* and his heirs; and if either of them died without issue, then the survivor to be his heir. Resolved this is an estate-tail in each, and not contingent devises over. *Chaddock and Cowley, Cro. Jac. 695.*

Of Executory Devises of Leases for Years, and of the Limitation of the trust of a term.

Of executory
devises of leases
for years, and the
limitation of the
trust of a term.

IT has been a great question, whether the disposition of the term to a man for his life was not such a total disposition of it, that no remainder could

could be limited over, it being in the eye of the law a greater estate than for any number of years, which was resolved in the affirmative, 6 E. 6. Dier 74. by all the judges of England: But this resolution seeming very severe, and against natural justice, that a man should be hindered from making a provision for his family, a contrary resolution obtained; for the judges observing the good effect such limitations by way of trust had, which were allowed in chancery, permitted farmers to dispose of their leases in the same manner by last will, and then the chancery, the better to fix them in it, allowed of bills by the remainder man to compel the devisee of the particular estate to put in security, that he in remainder should enjoy it according to the limitation; but when they perceived that this multiplied chancery suits, they resolved that there was no need of that way, 10 Co. 47 a. 52. b. 1 Sid. 451. but that the particular devisee should not have power to bar the remainder man; so that the law has been long settled, that executory devises are good, provided the contingency is to happen within a life or lives, all in esse; for there is no tendency to a perpetuity, which was one great mischief apprehended from these kind of limitations.

Lessee for years, devised his intire term to A. provided if he die whilst J. S. is living, then the residue shall remain to J. S. A. aliened and died. Per Hales and Montague, J. S. is without remedy. 6 E. 6. Dier 74. Sed vide Dier 277, 328, 358.

Lessee for years devised, that his wife should have and occupy the term for so many years as she should live, and after her death he gave and bequeathed the residue of the said years, then unexpired, to his son and his assigns, and made his wife sole executrix and died. The wife entered agreeing to the legacy, and after aliened the term, and the alienee granted it again to the wife, and the wife died within the term; and adjudged that the son or his administrator should

Devise that wife shall occupy the term for so many years as she shall live, the residue to the son; the wife who is executrix, enters, assents and alienes; the son shall have the residue.

Assent to the particular estate, is assent to the remainder. The devise to the wife not absolute of the intire term.

The devise to the son shall be expounded to precede the devise to the wife.

The interest of the son not devested by the alienation.

Devise of a term to the son, and that the wife, who is executrix, shall have the profits during his minority, the wife aliens, the entry of his son at his full age lawful.

should have the residue of the term. Assent to the particular estate shall reach to the remainder also; but an assent to a devise of a rent shall not extend to the devise of the term. The devise to the wife for her life, is not an absolute devise of the intire term, but conditionally, or upon limitation, (if she lives so long); for if she dies, her interest is determined by the limitation, and devise to him for his life by implication, (because the residue of the term is devised to the son after the death of the wife, in which is implied that the wife shall have it for her life), and also determinable by the limitation as abovesaid; and the devise to the son shall be expounded to precede the devise to the wife, and so both shall stand. The devise to the wife and son is of one same thing (*scilicet*) of the land itself, and the wife shall have the collateral occupation only of the land by the devise, but the very interest and term of the land she shall have conditionally, and so two parties of one term, the one to the wife, and the other to the son, and then the execution of the devise in the wife shall be execution of the legacy to the son. The alienation of the wife hath not devested the interest of the son, which is accrued to him by the condition or limitation, nor extinct the condition or limitation which shall transfer the interest to him. *Hil. 20 El. Welken and Elkington, Plowd. 519. 2 Rol. Ab. 300. p. 5.*

A termor devises all his term to his son, and besides saith that his will and intent was, *that his wife should have the occupation and profits of the land during the minority of his son*, to the intent, that with the profits she should educate his children, and see his will performed, and makes his wife his executrix and dies; the wife proves the testament, educates the children, and afterwards sells the term to one to whom the testator was indebted, having then sufficient of the goods and chattels of the testator, to pay all his debts, besides the said lease, and

and after she dies; the son at his full age enters, and his entry was adjudged lawful. *Hil. 21 El. Paramour and Yardley, Plowden 540.*

Error on a judgment in *C. B.* the case was, I devise my lease to my wife during her life, and after her death I will it to go to her children unpreferred. The feme being executrix entered by virtue of the legacy, and married; the sheriff by *feri facias* sells the term for the debt of the husband; the judgment is reversed; the wife dies, and a daughter unpreferred enters. Resolved this executory devise was good, and not destroyed by the sale, although the person was uncertain. *M. 26, 27 Eliz. Amner and Loddington, And. 60. 2 Leon. 92. Godb. 26. 8 Co. 96. b. Jenk. 264. Godol. 354. 2 D. A. 522. p. 4.*

Lessee for years devised to *M. M.* after the death of his wife, and that in the mean time his wife should have the use and occupation during her life, paying to *M. M.* 7 l. per Annum during her life; and made the wife executrix and died; the wife administered, entered, paid the rent, and said that *M. M.* should have the term after her death, and died intestate; *M. M.* entered, and took out administration *de bonis non, &c.* Resolved, that the devise to *M. M.* was good, that the payment of the rent was a sufficient assent to the legacy, that *M. M.* did not take by way of remainder, but by executory devise, and that in judgment of law the executory devise should precede, and as if he had devised, that if the feme die within the term, that *M. M.* should have the remainder of the term, and over to the feme for life. *Hil. 7 Jac. Mathew Manning's case, 8 Co. 94. 1 D. A. 66. J. p. 1. 162. D. p. 1. Co. Ent. 149.*

Lessee for 400 years devised to his executor for life, the remainder to his sister *M.* and dies; *M.* marries, her husband and she release to the executor, who demises and dies; the husband dies. *M.* takes a second husband,

Devise of a term to the wife for life, then to her children unpreferred, a good executory devise.

Devise of a term to *M.* after the death of the wife, and that in the mean time she should have the use and occupation, is an executory devise.

Devise of a term to the executor for life, remainder to *M.* is good as an executory devise.

who leases to the plaintiff: resolved, that the devise of a term to *A.* for life, the remainder to *B.* for life is good as an executory devise, and so it is of the term in the same manner; the first devisee cannot bar the executory devise; the executor's assent to the first devisee, enures to the second; if such a devise be made to the executor, and he enters generally, he takes as executor; such an executory devise cannot be granted over, but may be extinguished by a release to the first devisee. *Mich.* 10 *Jac.* 1. *Lampet's Case*, 10 *Co.* 46. 2 *Brownl.* 172. 1 *D. A.* 626. *G. p.* 3. 2 *D. A.* 518. *p.* 5. 535. *D. p.* 1. 537. *p.* 1. 2 *Rol. Ab.* 404. *M. p.* 2. 405. *p.* 6, 7. 407. *p.* 5.

Devise of the occupation of a term to the wife, remainder to *R.* for life, and if he died without issue during the term to *J.* the remainder to *J.* good,

Lessee for 69 years devised, that his wife should have the occupation, manurance and profits of the house and land to him leased, if she should live so long unmarried, and inhabit in the said house; and if she married or died within the term, that then Robert his eldest son should have the occupation of the same for so long time as he should live, and should have issue of his body, and during the same time repairing the same; and if he died without issue during the said term, that then Jasper, another of his sons, to have this for so long time as he shall live and have issue of his body. The remainder over to Jasper was adjudged to be good, no interruption being made before to hinder the same. *Hil.* 9 *Jac.* 1. 2 *Bulstrode* 28. 2 *D. A.* 518. *p.* 7. *Vide Cro. Jac.* 461. *Palm.* 335.

Devise of a term to the wife, for life, remainder to the son and his assigns, and if he die without issue then living, remainder over.

Lessee for a term of years devises it to his wife for life, and after to his eldest son and his assigns, and if he dies without issue then living, remainder over; this being a perpetual limitation by intendment of law, is void; and if men should be admitted to make such devises, there would not be any end of them, nor certainty. *Trin.* 15 *Jac.* 1. *Child and Baily*, *Cro. Jac.* 459, 460. *Palm.* 48, 333. *Jones* 15. 2 *Rol. Rep.* 129. 2 *D. A.* 522. *p.* 5.

The authority of this case is shaken by that of the duke of Norfolk's, 3 *Cha. Ca.* and denied to be law, *Salk.* 225. See the case more fully 3 *Ch. Ca.* 36, 37. See *Sanders and Cornish's case*, *Mich. 7 Car. 1. Cro. Car.* 230. 2 *D. A.* 521. p. 2. *Rel.* 611, 612.

A. being possessed of a term for years, devised it to his wife for 18 years, and after to *C.* his eldest son for life, and after to the eldest issue male of *C.* for life. *C.* had issue male at the time of his death, though he had not at the time of the devise or death of the devisor. Resolved by lord keeper *Coventry*, Mr. justice *Jones*, Mr. justice *Croke* and Mr. justice *Berkley*, that such issue male should take by way of executory devise, though not in esse at the time of the devise, and there be a contingency upon a contingency, because it would wear out in a short time. *Cotton and Heath*, *Rel. Ab.* 612. 2 *D. A.* 525. p. 3. *Pol.* 26. 3 *Ch. Ca.* 35, 51.

The trust of a long lease was limited and declared thus: To the father for 60 years, if he lived so long; then to the mother for 60 years, if she lived so long; then to *John* their son, and his executors, if he survived his father and mother; and if he died in their life-time having issue, then to his issue; but if he died without issue, living the father and mother, then the remainder to *Edward* in tail. *John* died without issue in the life-time of the father and mother: The question was, whether *Edward* should take this remainder after their deaths. It was resolved by *Bridgeman* lord keeper, assisted by *Twissden* and *Rainsford* justices, that the remainder to *Edward* was good; for the whole term had vested in *John* if he had survived, yet the contingency never happening, and so wearing out within the compass of two lives in being, the remainder over to *Edward* might well be limited upon it. *Trin.* 21 *Car.* 2. *Wood and Sanders*, 1 *Ch. Ca.*

A term devised for years, remainder to *C.* for life, remainder to the eldest issue male of *C.* for life, which issue shall take by way of executory devise, though not in esse at the time of the devise.

Trust of a term limited to the father for 60 years, if he lived so long, then to the mother in like manner, then to *J.* their son, if he survived the father and mother; if he died in their life-time, leaving issue, then to such issue; if without issue, remainder over to *Edward*. *J.* died without issue in the life-time of the father and mother, the remainder over to *Edward* good.

131. 2 Ch. Rep. 239. Pol. 35. 3 Ch. Ca. 37, 40, 51.

A term devised to the wife for life, remainder to the first son for life, and if he died without issue, remainder to the second son. The last remainder void, as being upon too remote a possibility.

Nicholas Love being possessed of a term for 99 years, if his three sons, *Nicholas Robert* and *Barnaby*, or any of them, lived so long, devises the lease to his wife for her life and after her decease to *Nicholas his son for his life, and if Nicholas die without issue of his body begotten, then to Barnaby*. *Nicholas* the testator died, his wife died, and the question upon a special verdict was, whether *Barnaby* had any interest or possibility of estate after the decease of *Nicholas* the son and devisee: It was held that the remainder to *Barnaby* was void; for the remainder of a term cannot depend upon a possibility so remote as the dying without issue, though it was objected, that the devise was not to the first son and his issue, (in which case it was agreed it would go to his executor;) but it was given to him for life only, with an executory devise to the second son upon a contingency of the first not having issue at the time of his death. *Pasc. 22 Car. 2. Love and Windham, entered Trin. 21 Car. 2. rot. 1605. Lev. 290. Vent. 79. 2 Keb. 637. 2 Ch. Rep. 14. 2 D. A. 523. p. 6.*

Term devised to the son; if he died unmarried and without issue, to the daughters: If married and no issue then living, then, after the death of son's wife, to the daughters.

Lessee for years devised the term to his son, and if he died unmarried and without issue, to his daughters; and if his son be married, and has no issue to enjoy it, then after the death of his son's wife, he devised it to his said daughters. The devise over to the daughters was held to be void, being a limitation after the death of their brother without issue; for it is not to be taken (as objected) that the dying should be without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such a dying without issue, yet the court held it would be void according to *Child* and *Baily's* case (*supra*); for though such a devise had prevailed in the case of an inheritance, as in *Pell* and *Brown's* case (*antea fol. 78.*) yet it hath not yet prevailed in the

the case of a term; and the court said, they would not extend the devise of chattels to make perpetuities farther than they had been. *Gibbons and Summers*, 3 *Lev.* 22, 23. 2 *D. A.* 253. p. 7.

The earl of *Arundel* had issue *Thomas*, *Henry*, *Charles*, and several other sons, and settled the manor of *Graystock*, and several other lands, to the use of himself for life, remainder to the earl of *Dorset* and others, for 200 years upon trusts, to be declared by another indenture; remainder to *Henry* in tail male, remainder to *Charles* in tail male, with like remainders to the other sons; and by another indenture the term was limited to be in trust for *Henry* and the heirs male of his body; provided, that if *Thomas* die without issue male in the life-time of *Henry*, then to be in trust for *Charles* and the heirs male of his body, and for default of such issue, in trust for the next son in tail, and so to the rest.

A term limited in trust for H. and the heirs male of his body, provided that if T. die without issue male, in the life-time of H. then in trust for C. &c. This is a good springing trust, upon a contingency to C.

Thomas died without issue in the life-time of *Henry*; the earl of *Dorset*, being the surviving trustee, assigns the term to *Marriot* upon the same trusts, who surrendered to *Henry*; *Charles* brought his bill to be relieved, and to have the lands decreed to him according to the trust.

Finch lord chancellor called to his assistance *Pemberton* and *North*, chief justices, and *Mountague* chief baron; who delivered their opinions, that the limitation of the remainder to *Charles* was void; for when a lease for years in gross is limited to one in tail, he has the absolute propriety in it, and may alien it without fine, and his executors, and not the issue in tail, shall have it, and no remainder can be limited over; for so a perpetuity would be raised of a term which cannot be of a freehold, for there would be no way to bar it: But a term which is attendant upon an inheritance may be limited to *A.* in tail, remainder to *B.* in tail, according as the inheritance is limited, and will go along with, and cannot be aliened or barred, but

G

together

together with the freehold estate; but this lease must not be limited to other uses than the freehold is limited, for if it be, it is become a term in gross, and within the rules of such a lease: And *North* chief justice held, that whether the remainder was limited upon dying without issue in the life of *H.* it is void, because there is a fee in either case.

The lord chancellor was of a different opinion, for he held the remainder good, because limited upon no remote possibility, but upon an ordinary and usual contingency, as dying without issue in the life-time of another person; which naturally spends; and people may expect the event in some reasonable time.

A lease assigned in trust for *A.* for life, remainder to *B.* for life, with remainder to twenty other persons all in being at the time, good; because, like candles, all lighted at a time, and have an easy common probability of determination.

So to *A.* for life, remainder to his first issue for life, good; because no vast incertain distance of time. *Cotton and Heath, supra fol. 79.*

That a gift to *A.* in fee, but if *A.* dies in the life-time of *B.* then to *B.* in fee; this is a good remainder, though upon a fee, because limited upon so near a probability.

So the trust of a lease to the father and mother for their lives, remainder to *A.* their eldest son in tail; and if *A.* die in the life-time of the father and mother, then to *B.* this remainder is good, because upon a common contingency. *Wood and Saunders, supra fo. 79.*

He said that the rule in *Popham, 1 Co. 156.* that there cannot be possibility upon possibility, holds not, but fails in many cases; for he said, that in truth most remainders were so.

He agreed, that if they tended to perpetuities they were void; for perpetuities fight against God in contending to give a fixation and continuance

ance to things which human affairs will not admit of, and they are against commerce and the public commodity.

So a lease in trust for *A.* for life, the remainder to the 1, 2, 3, &c. Sons in tail (he having no sons) the remainder to his daughter in tail; in this case, though the daughter was in being, and the remainder might vest presently, yet because this tended to a perpetuity, the remainder to the daughter was held void. *Burgess and Burgess, Pol. 40. Finch Ch. Rep. 91. Mod. 114. 1 Cha Ca. 229.*

He said he would not extend a trust farther than a conveyance of the legal interest would be good at common law, for he was not for setting up a rule of property in Chancery dissonant from the rules of law.

But he durst not conclude this remainder void, 1. Because it concerned the settlement of many estates. 2. Because it was done by the advice of Sir Orlando Bridgman, a person of great learning and experience, and who afterwards, when he was lord keeper, decreed another case in point, viz. *Wood and Sanders, supra fo. 79.* 3. He did see no reason why there might not be a springing trust of a term as well as a springing estate of a freehold; and why men, seeing many of their estates are in leases, may not settle them according to the occasions of their families, as well as freeholds; seeing they differ only in name, and not in the nature and propriety of the thing: And therefore as a freehold may be limited to the donor in fee till such a marriage takes effect, and after to the use of the married couple, why may not the trust of a term be so limited? He agreed the great or less number of years made no difference: He said, that *Marriott* having broken the trust, and *Henry* knowing of the trust, and being of consent, they must recompence the thing to *Charles*, and that the estate of *Henry* being affected with the trust,

should account for the mean profits. But in regard the judges opinions were against him, he said he would not presently decree the thing, but suspend his opinion. 24 March 1681. On the 17 June 1682. he made a decree accordingly. On the 15 May 1683. upon a bill of review the decree was reversed by North, lord keeper; and on the 19 June 1685. the first decree was affirmed by the house of lords. Howard against the duke of Norfolk, 3 Ch. Ca. fo. 1. to 54. 2 Ch. Rep. 229. Vern. 163.

Executory devise, and limitation of the trust of a term governable alike. Devise of the remainder of a term after a dying sans issue generally void.

Note executory devise, and the limitation of the trust of a term, are governed alike. Vern. 234.

A termor of 1000 years without impeachment of waste, devised the same to Lee, and if he died without issue, to Burford; the devise to Burford being after dying without issue generally, is void. Hil. 1696. Burford v. Lee, Freeman's Ca. in Ch. 210.

Term devised to A. and the heirs of his body, and if A. die without issue living B. then to B. good.

A term was devised to A. and the heirs of his body, and if A. die without issue, living B. then to B. this is a good limitation, the contingency arising within the compass of a life. Lamb and Archer, 5 W. & M. Salk. 225. Carth. 266. Skin. 340. Comb. 208. Holt 227. Cases B. R. 44. and the case of Child and Bailly was denied to be law.

Term devised to A. his executors, &c. but if he died before 21 without issue, remainder to B. good.

J. S. devised a leasehold estate to his eldest son, his executors, administrators and assigns for ever; but if his eldest son died before twenty-one without issue, in that case he devised it over to his youngest son; the question was whether the remainder over was good; it was objected that it was a perpetuity, for that the remainder depended on the son's dying with issue; for if he died before twenty-one, though he left a child, and that child afterwards died without issue; the son might be said to have died before twenty-one without issue; sed non allocatur; and the remainder over was held to be good. Trin. 1690. Martin and Long, 2 Vern. 151. Prec. Ch. 15.

Lessee

Lessee for years devised his term to his wife for life, after her death to *R. F.* for life, and after her death to *T. F.* and his children, and if *T. F.* shall happen to die before the expiration of the term, not having issue of his body then living, then to go over to *A. B.* for the residue of the term. It was resolved, that the remainder over to *A. B.* was good by way of executory devise, and that the words *then living* must relate to the time of the death of *T. F.* the contingency must happen within the compass of one life or not at all; for upon the death of *T. F.* it will be certainly known whether he leaves issue or not; if he does, the contingency cannot take place; if he does not, it may. *Trin. 1709. Fletcher's case.*

Term devised to *T.* and his children, and if he die before the expiration of the term not having issue of his body then living, remainder over to *A. A.* takes by way of executory devise.

One possessed of a term for years, devised it by his will to his son *Henry* for his life, and no longer, and after his decease to such of the issue of the said *Henry* as *Henry* by his will should appoint; and in case *Henry* should die without issue, then the testator devised the same to his brother *Albinus* for the residue of the term, and died; *Henry* died without issue living at his death; whereupon the question was, whether the term should go to the executors of the first testator, or to the executors of *Henry*, or to *Albinus*? *Object.* The devise over of a term upon a death without issue is void, being too-remote an expectancy, and tending to a perpetuity. *Lord Parker:* The expression of dying without issue has two senses, 1. A vulgar sense; and that is dying without leaving issue at the time of his death. 2. A legal sense, and that is whenever there is a failure of issue. And if this will be taken in a vulgar sense, viz. if *Henry* dies without issue at the time of his death, then the devise over to *Albinus* is good; and this seems to be the meaning of the testator in the principal case, for it must be intended such issue as he should, or at least might appoint the term to, which must be intended *issue then living*: And this construction shall be the more favoured, in regard it supports

Term devised to *A.* for life, remainder to such of his issue as he should appoint; and if *A.* die without issue, remainder to *B.* the devise to *B.* is good.

the will, whereas the other destroys it: Therefore the court held that the devise over of the term to *Albinus* was good, and observed that there was a great diversity between a devise of a freehold estate for life, and if *A.* dies without issue, then to *B.* and a devise of a term in the same words; for in the former case this might give *A.* an estate-tail, because the words *if he die without issue*, in case of an inheritance are inserted in favour of the issue, and to let in the issue, after the death of the father; but in case of a term these words cannot have such an effect, for the father takes the whole, which on his death will not go to his issue, but will belong to the executors. Also the lord chancellor cited the case of *Lodington and Kime*, 3 *Lev.* 431. [*antea fo.* 65] which his lordship said was in some points of it ill and mistakenly reported by serjeant *Levinz*, though he himself was of counsel in it, and that this was a stronger case than the principal. *Pasc.* 1718. *Target v. Gaunt*, *Wil. Rep.* 432. *Vide Nichols v. Hooper*, *Wil. Rep.* 198. *Pinbury v. Elkin*, *Wil. Rep.* 563. and *Forth v. Chapman*, *Wil. Rep.* 663. See *Eq. Cas. Abr.* 193. 202. pl. 22. *Gilb. R.* 149. 10 *Mod.* 402. 2 *Eq. Cas. Abr.* 559. pl. 4. 2 *Vern.* 686. 758 766. *Prec. in Chan.* 483. 2 *Eq. Cas. Abr.* 292. pl. 16. 359. pl. 15.

Of uncertain Interests in Lands by Devise.

Lands devised to executors for payment of debts, and after debts paid remainder over. The executors have an uncertain interest which shall go from executor to executor,

A Man devised lands to his executors for payment of his debts, and after his debts paid the remainder over; it was admitted that the remainder over was good: But the question was, what estate the executors had, no particular estate being limited; if they had an estate for life, it might determine before they could receive sufficient to answer the end of the devise, for on their death it would not go to their executors; wherefore

fore it was adjudged an incertain interest which should go from executor to executor for payment of debts. *Cordal's case*, *Cro. Eliz.* 315. 8 Co. 96. a. *Jones* 25. *Rol. Ab.* 829. 3 D. A. 203. P. p. 6.

Church devised lands to his daughter in fee, she being then a year old, and declared, that his executors should receive the profits of those lands, until his daughter came to the age of one and twenty years, towards payment of his debts and legacies. The daughter died when she was but five years old. Lord keeper *Bridgman* was of opinion, that the charging the profits till the daughter should attain one and twenty (though she died before) amounted to a term till she should have attained that age if she had lived. *Carter against Church*, 1 Ch. Ca. 113. The executor's term is certain by the intent of the devisor, who had computed that the profits of his lands till his daughter might attain twenty-one, would be sufficient to pay his debts; otherwise the intention of the devisor would be frustrated. *Boraston's case*, 3 Co. 19. 2 Rol. Ab. 419. K. p. 1. *Hugh's Entries* 92. *Vide Dier* 210.

Lands devised to the daughter in fee, and that the executors should receive the profits till she attain to twenty-one, to pay debts, tho' the daughter die before twenty-one, they shall receive the profits until the time she would have attained twenty-one if she had lived.

If a man devises land to his wife till his son comes of age, to provide his children with necessaries, though the wife dies before the son comes of age, yet her interest does not determine by her death, because it is not a matter of mere confidence, but shall go to her executors: But if the devise had been that his land should descend to his son, but that his wife should have the profits thereof until the full age of his son, for his education, she is but in the nature of a guardian or bailiff for the benefit of the son; nothing is devised to her but a mere confidence that she should take the profits for the education of the son, and that determines by her death. *Smith and Haven*, *Cro. Eliz.* 252. *Gedol.* 349.

Lands devised to the wife till the son comes of age, to provide necessaries for the children. The wife has an interest which does not determine by her death.

Lands devised to the wife until the heir attained twenty-one, and then to the heir in fee; the interest of the wife determines on the death of the heir, though before he attain twenty-one.

A man devised lands to his wife (whom he made executrix) until his son and heir apparent should attain the age of 21, and then to his son and his heirs. The son died at the age of thirteen years; the devise to the wife not being for the payment of debts, and no creditors or want of assets appearing, it was held by the lord chancellor, that the wife's estate determined by the death of the son, and that the remainder vested presently in the son upon the devisor's death, and was not to expect until the contingency of his attaining the age of twenty-one years should happen; for then in this case it would never have vested, he dying before that age. *Mansfield and Dugard, Reports in Equity 36.*

Devise to two sons and the heirs male of their bodies, that they shall not enter till their several ages of twenty-one, and the executors shall have the profits in the mean time; the first son that attains 21 may enter.

John Aylet, a copyholder, surrendered to the use of his will, and thereby devised the lands to his sons *John* and *Henry Aylet*, and to the heirs male of their bodies, and wills that they shall not enter till their several ages of twenty-one years, and that his executors shall have the lands to perform his will until his said sons shall come to their several ages of twenty-one years. *John* attains his age of twenty-one years; it was resolved, that the executors should not hold the land till they both came of age, but that *John* might enter, the words being until they should come to their several ages of twenty-one that is, *reddendo singula singulis*, when either of them came to the age of twenty-one, he should then have his part and possession, and yet the joint-tenancy should hold place. *Aylet and Choppin, Cro. Jac. 259. Telv. 183. Brownl. 147.*

Lands devised to trustees till 800*l.* be raised, they shall only hold the land till that sum might be raised, unless disturbed by the heir.

Sir Andrew Corbert devised his lands to *R.* and *C.* till 800*l.* should be raised for the preferment of his daughters. It was adjudged that *R.* and *C.* should hold the lands no longer than they might have received that money out of the profits; and that if a stranger enters after the death of the devisor, they may have an account of the mean profits, but cannot hold the land longer than the sum might have been levied; for if that was to be allowed

allowed, they might make it an eternal charge upon the heir's estate; but if the heir himself enters and disturbs them, they may hold over, for the heir shall have no benefit of his own wrong, or they may have their action against him at their election. *Corbet's case*, 4 Co. 81. *Blackburn and Lassels*, Cro. Eliz. 800. *Salk.* 153.

Of Devises by Implication.

THE law in conveying estates did not regularly suffer any thing to pass by implication, because it is a manner of transferring no ways agreeable to the plainness and solemnity of the law: As if *A.* surrendered to the use of *B.* and *C.* and for want of issue of *C.* the remainder to *D.* this in a conveyance at law had been but an estate for life to *C.* and no estate-tail by implication; but as there has been greater favour and latitude allowed in the disposition of estates by will, and in the construction of them, the judges to support the intent of the deviser, where it has been very apparent, have admitted of estates by implication, though to the disheriting the heir at law; but where such estate arises, it must be by a necessary and not a possible implication, for the heir's title being plain, no words by construction shall impeach it which will bear a contrary signification. *Vaugh.* 263.

If *A.* devises land to his heir after the death of his wife, this is a good devise by implication to the heir, or to one wife for life, for by the express words of the will of the heirs after the death of the the heir is not to have it during her life, and if wife, gives the the wife has it not, none else can, for the executor cannot intermeddle. *Rol. Ab.* 843. *Moor* life by implication: Aliter, if 852. *Cro. Jac.* 415. *Rol. Rep.* 398, 436. *Bridg.* to a stranger after 84. 3 *Bulstr.* 192. *Godol.* 338. 3 *D. A.* 178. the wife's death, p. 1. 179. p. 3. 180. p. 5. *Vern.* 22. 2 *Vern.* 572. 2 *Vent.* 223. If a man having a wife and two

Whether there
can be an estate
for life of a term
by implication

two daughters his heirs at law, *devises lands to one of his daughters after the death of his wife*, this gives the wife an estate for life, though the daughter was but one of the coheirs. 2 *Vern.* 723. But if a man devises to a stranger after the death of his wife, this gives the wife no estate for life by implication, for it is but a demonstration when the estate of a stranger shall commence. *Bro. Devise*, 52. *Cro. Jac.* 75. *Vern.* 22. 2 *Vern.* 572. 2 *Vent.* 223. it is said, that if a man possessed of a term for years, *devises it to his son after the death of his wife*, and the wife is made executrix, she shall have the whole term as executrix, for there cannot be an estate for life of a term by implication, as there may be of an inheritance. *Rayman and Gold, Moor* 635. *Sed Quære*; I apprehend this case not to be law; for in this case it is also resolved, that a term cannot be devised to one for life with remainder over, which seems to be the ground of the above resolution; but it is now held that the law is otherwise; and if a will can by express words give a term to one for life with remainder over, I do not see why it may not do so by a necessary implication.

Devise to a stranger after the wife's death, the husband shall take during her life.

A man seised of a manor, parcel in demesne and parcel in service, *devised to his wife all his demesne lands for life, and all the services and chief rents for fifteen years, and devised the whole manor after the death of the wife to a stranger*: Resolved, that the last devise should not take effect for any part of the manor till after the wife's death; that the wife takes not an estate for life by implication in the services and chief rents; that the heir of the devisor after the fifteen years spent, shall have the rents and services during the life of the wife. *Moor*, pl. 24. *Vaugh.* 365.

Devise to the son and his heirs, and if the daughters outlive the son and his heirs, then to the daughters,

A man *devised lands to his son and his heirs, and if his daughters overlived his son and his heirs, they should have it for their lives*. Resolved that the son had an estate-tail by implication, and not a fee-simple; for

for as long as the daughters lived, the son could not die without heirs collateral; and therefore the intent of the deviser shall be taken to extend to the heirs of his body, and so be an estate-tail.

Webb and Herring, Cro. Jac. 415. Moor 852.

Rol. Rep. 398, 436. Bridg. 84. 3 Bulst. 192.

Godol. 338. 3 D. A. 178. p. 1. 179. p. 3.

180. p. 5. Salk. 233. 3 Lev. 70. 7 Co. 4.

3 Mod. 123. Tye versus Willis, Forrester's Rep. 1.

One having issue a son, who was his heir apparent, and two daughters, devised in these words :

If it happen that my son and daughters die without issue of their bodies, then all my lands shall be and remain to my nephew D. and his heirs for ever. It

was resolved, 1. That no express estate was given by the will to the children. 2. Nor any estate by implication, because then it must be either a joint estate for life, with several inheritances in tail, or several estates-tail in succession one after another; the last it cannot be, because it is uncertain which shall take first, and which next; and the first it shall not be, because the heir at law shall not be disinherited without a necessary implication, which in this case there is not, because it is only a designation or appointment of the time when the land shall come to the nephew, as if he had devised thus: I leave my land to descend, or give my land to my son and his heirs, till he and my daughters die without issue, or so long as any heirs of the body of my son and the bodies of my two daughters shall be living; and then, or for want of such heirs, I devise, the same to my nephew; This is good as a future or executory devise, and in the mean time the land shall descend to the heirs at law. *Gardiner and Sheldon, Vaugh. 259. 2 Keb. 781.*

Frenchman devised lands to A. and his heirs male, and if he died without heirs of his body then to remain to B. in fee; this is but an estate in tail male to A. for the law supplies the words of his body, and since

the son by implication has an estate-tail.

One having issue a son and 2 daughters, devised, if his children died without issue, to his nephew in fee; no estate by implication to the children, but the land shall descend to the son.

Devise to A. and his heirs male, and if he dies without heirs of his body, remain-

the

der over. The
issue female shall
not take by im-
plication.

the devisor only gave it by exprefs words to him
and his heirs male, it would be against the plain
words of the will to let in the issue female by im-
plication on the other words, viz. if he die with-
out heirs of his body. *Dier 171.*

Devise to A. and
the heirs of his
body, and if he
dies, without
heirs, remainder
over; no fee by
implication.

If a man devise to A. and the heirs of his body, and
if he die without heirs, remainder over, these last
words shall not give the devisee an estate in fee by
implication. *2 Vern. 451.*

*Where upon a Devise of Lands there shall be
an implied trust for the Heir.*

Lands devised for
payment of debts
and legacies, a
legacy to the
heir, but none to
the devisee, no
implied trust of
the residue for
the heir.

Catherine Crompton makes her will as follows:
I appoint *Henry North, Esq;* to be my exe-
cutor, and I give all my estate real and personal,
to dispose of for the payment of all my just debts,
and for the performing of all such just legacies as
I have herein, or by the codicil annexed, be-
queathed, unto my executor; and gives several
legacies in money, and amongst the rest 200 *l.* to
her heir at law, but no legacy to the executor.
It was decreed by *Bridgman* lord keeper, assisted
by *Twisden, Wyld, Rainsford* and *Windham*, justices,
that there was no implied trust of the surplus for
the heir, for if there was, the devisee would have
no benefit, and the devise, of 200 *l.* to the heir,
was to no purpose, if she intended he should have
the surplus. *North and Crompton, 1 Ch. Ca. 196.*

Devise of lands
to trustees to sell
to pay debts,
&c. the heir shall
have the sur-
plus.

Philip Starkey devised his lands to two gentlemen
of his acquaintance (who were not of kin to him)
and their heirs in trust, to be sold by them, or the
survivor of them, for the best price, and with the
money to pay his debts, legacies, and funeral charges
so far as the same would extend; and among other
legacies he gave 40 *l.* to *Jane Stiles*, and 10 *l.* to
Eliz. Stiles (who were his cousins and coheirs) and
made the two devisees his executors, giving 100 *l.*

to

to the children of one of them. The surplus of the money arising by the sale amounting to 500*l.* the question was, whether it should go to the trustees, who were also executors, or the heirs at law. *Lord Chancellor*: The will being that the executors should sell the estate for the best price that they could get for the same, this clause need not have been put in if the devisees were intended to be owners; supposing the personal estate had been sufficient to have paid the debt, and that there had been no need of any sale, surely the devisees should not, in such a case, have gone away with the estate from the heir at law. The trustees are to apply the money arising by the sale in payment of debts, legacies, and funeral charges, by which is implied the whole money, and that shews it was not designed to be a beneficial trust. Devising the estate and power of sale to the survivor, is a farther argument of its being rather a trust than an ownership, and that the trust was intended to follow the estate: Wherefore let the devisees account for the surplus to the heirs at law. *Hil. 1717, Starkey v. Brookes, Wil. Rep. 390. 2 Eq. Cas. Abr. 496. pl. 14.*

Lands were devised to trustees to sell, and out of the money arising by the sale, amongst other sums, to pay 100*l.* to the heir at law; and no disposition is made by the testator of the surplus of his estate. It was held, that no more should be sold than was necessary, and that the heir should have the residue as a resulting trust. *Randal and Bookey, 2 Vern. 425.*

The testator by will devised his lands to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of such appointment to his four nephews: The testator by writing appoints his trustees to pay several sums to several persons, but not to near the value of the land. It was held, that the nephews should not have the residue, but that the heir at law should have it as an interest resulting, and not disposed

Lands devised to trustees, to be sold for, &c. no more to be sold than is necessary.

Resulting trusts for the heir.

disposed of. *The city of London and Garway*, 2 Vern. 571.

A. devised his real estate to his executors, to be sold for payment of debts, the surplus, if any be, to be deemed personal estate, and to go to his executors, to whom he gives 20*l.* a-piece. It was held, that the surplus should be a trust for the heir at law. *The Countess of Bristol and Hungerford*, 2 Vern. 645.

+ But this was because
the same person was both
at law & next of kin.

The testator devised lands to three persons and their heirs, to the use of them and their heirs, upon the trusts after mentioned, and then the testator directs them to convey part to *A.* for life, and other part to *B.* in tail, but gives no direction as to the remainder in fee, though two of the trustees were related to the testator; yet it was held, that the remainder in fee should be a resulting trust for the benefit of the heir at law. *Hobart and The Countess of Suffolk*, 2 Vern. 644.

The testator devised to his cousin *J. M.* lands to hold to him and his heirs for ever, in trust to be sold for payment of all his debts and legacies within a year after his death, and makes him executor, but gives him no legacy. It was held, that there was no resulting trust for the heir at law; for then the executor who is taken notice of as cousin, would have nothing for his trouble. *Cunningham and Mellish*, *Pres. Ch.* 31. 2 Vern. 247.

Of Devises of Lands for Payment of Debts.

Of devises of
lands for pay-
ment of debts.

Creditors are so far favoured in equity, that whenever it appears to be the testator's intent that his lands shall be liable to his debts, equity will charge them, though there be not express words; but there must be something more than a bare declaration that his debts shall be paid out of his real estate; otherwise the personal, and not the real estate shall be liable.

A

A man seised of copyhold lands, surrenders them to the use of his will, and then by his will says, *my debts and legacies being first deducted, I devise all my estate, both real and personal, to J. S.* It was held by the lord chancellor, that this amounted to a devise to sell for the payment of debts. *Newman and Johnson, Vern. 45.*

A. in one part of his will *devised all his lands to B. and the heirs of his body;* and in another part reciting, that he owed money to *B.* upon account; he therefore *devised to him all his personal estate, and made him executor, willing him to pay his debts.* The court decreed both real and personal estate to be sold for payment of the testator's debts, though the clause as to the payment of debts seemed to relate to the personal estate only, and though the lands were devised to *B.* in tail, with a remainder over to another, and though it was objected that a tenant in tail could not be a trustee. *Clowdsley and Pelham, Vern. 411. Nels. C. R. 178. 2 Vern. 229.*

I will all my debts shall be paid before any of my legacies or gifts herein after-mentioned; and devises several pecuniary legacies; and after in the same will devises land to *J. S.* upon condition to pay a certain rent to *J. N.* and other lands to *J. S.* on condition to pay 5*l.* per annum to *J. D.* and the question was, whether those lands were by the will subjected to the payment of the testator's debts, or only to the payment of the particular rents thereout devised: And the court held, that the lands were not subjected to the payment of the testator's debts; for the general clause in the beginning of the will shall be intended only of the personal estate and the pecuniary legacies thereout devised. *Eyles and Carey, Vern. 457.*

J. S. devised lands to his brother, who was his heir at law, in fee, gives several legacies, makes his brother executor, and desires him to see his will performed

My debts and legacies being first deducted, I devise my real and personal estate to J. S.

Devise of lands to B. in tail, and of all the personal estate, willing him to pay his debts, the lands liable.

I will my debts shall be paid before my legacies, lands not liable.

Devising lands to the heir makes them liable.

performed according to the trust and confidence he had reposed in him: This makes the real estate liable, for the testator need not have devised the estate to his brother, being heir at law, unless he had intended that he should take them chargeable with the debts and legacies. *Alcock and Sparhawk, 2 Vern. 228. affirmed in Dom. Proter.*

A. devised in the following words; I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me: First I will that all my debts be paid and discharged; and out of the remainder of my estate I give and bequeath to my wife 300 l. my mind and will is, that my wife have one moiety of what is left after my debts paid. Item, I give to my dear brother R. B. a close lying in the parish of —; and for the remaining part of my estate, as well real as personal, I give and bequeath unto my brother J. B. whom I make executor. It was held, that these words subjected his real estate to the payment of his debts. 2 Vern. 290.

I will and devise,
that my debts,
&c. be paid in
the first place.

A. being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words: Imprimis, I will and devise, that all my debts, legacies, and funeral charges, shall be paid and satisfied in the first place: Item, I give and devise, &c. and then proceeds to dispose of his real and personal estate: The personal estate not being sufficient to pay his debts, the question was, whether that clause in the will should amount to a charge on his real estate for the payment of his debts, legacies and funeral charges: Cowper lord chancellor, was clear of opinion that it should, for as to his debts it was but natural justice they should be paid, and his personal estate would have been liable to the payment thereof, whether he had given any directions in his will about them or not: When therefore he wills and devises that his debts, legacies, and funeral charges shall be paid and satisfied in the first place, these words must be intended to give

a preference for those purposes to any other whatsoever; and since he does not devise his real and personal estate to any person in particular for these purposes, the persons who come within that description must be supposed to be within his view, and it must be taken as a devise for their benefit preferable to any other disposition whatsoever either of his real or personal estate, and consequently both of them are thereby made liable thereto. *Trot and Vernon*, 2 Vern. 708. *Reports in equity* 111. *Precedents in Chancery* 430.

If lands are devised to trustees for payment of debts and legacies out of the rents and profits, the trustees may sell the land itself. 1 Vern. 104. 2 Ch. Ca. 205. But if the devise be to pay debts and legacies out of the annual rents and profits, the lands shall not be sold. 1 Vern. 104. If there be a devise of a certain sum to be raised out of the profits of lands, and the profits are not sufficient to raise the sum in a reasonable time, the court will decree a sale. Vern. 256. 2 Vent. 357.

Where on a devise to trustees to pay debts out of the rents and profits of land, they may sell.

A. devises that his executors shall receive the rents, issues and profits of his personal estate, in the first place to pay 60 l. per Annum to one for life, and after that person's death, out of the remainder of his estate his debts being paid, to raise portions for several children payable at twenty-one, and maintenance in the mean time, and devises all his lands in several parcels to several persons at further times: It was held that the lands were liable to be sold, and that the sale should be out of the devisee's lands unless the personal estate was sufficient; an account whereof was ordered to be taken in the first place. *Berry and Askham*, 2 Vern. 26.

Baron and feme seised in right of the wife, levy a fine to the use of — in fee, in trust, that if they pay 200 l. such a day, then in trust for such person or persons as the feme should declare, and for want of such declaration, then to the use

Where lands are devised to be sold, and not paid by whom, the executor shall sell.

of her and her heirs; then she by her will appoints the land to be sold, but says not by whom, nor to whom, and the money first to clear the mortgage, and then in trust for such other persons as she, &c. shall nominate, and dies. Ruled that the executor ought to sell, for he is the person trusted with the execution of the will. 4 May 1683. *Cheston and Knapton*. So declared in the house of lords *inter Pitts and Pelham*, Lev. 304. 2 Jon. 25. 1 Cha. Ca. 176. 1 Ch. Rep. 283. Lands devised to be sold, but not said by whom, and the bill was brought against the heir and executor to compel them to sell, and it was decreed they should. 12 November 1684. ——— and *Chapman*. Law of * *Executors* 221.

Devise that trustees shall sell lands for payment of debts; the trustees being creditors shall be paid in proportion, and not retain their whole debts.

Where an executor shall not retain his own debt, but be paid in proportion.

Agard being indebted to *Orm* and *Adderly*, conveyed lands to *Orm* and *Adderly* in trust to the use of himself for life, remainder to the trustees in fee to such uses as he should appoint by will, and for default of such appointment, to the use of the right heirs of *Agard*. *Agard* afterwards by will devises that the trustees shall sell his lands, and that all his debts shall be paid. The trustees sell the land; there not being sufficient to pay all the debts, and the trustees being creditors of *Agard*, would pay their own debts intirely, and pay the other creditors ratably. But *Finch* lord chancellor decreed, that the trustees should only take in proportion with the other creditors; and on a bill of review, this decree was affirmed by *North*, lord keeper; for neither the deed nor the will give them any preference; and where there is a loss, it is most reasonable that each one should bear part of it; but if it had appeared *Agard* had intended to prefer them, it would be otherwise. He said, though an executor is by law allowed to prefer himself, and also to prefer which of the creditors

* This book is said to be wrote by the learned judge Dodderidge.
2 Burn's Eccles. Law 505.

he will; because the law is severe enough upon them, and they are bound to take notice of all debts at their peril; yet if they come into this court for aid, they shall not have it unless they will consent to pay the creditors in proportion: It was agreed, the trustees ought to pay all equally, unless it be such where securities affect the land, as statutes, judgments, recognizances, &c. 22 Feb. 1683. *Orm and Adderly trustees for Agard.*

William Berners devised all his real estate to trustees and their heirs for the payment of his debts, and was seised of several freehold and copyhold lands, but had not surrendered his copyhold lands to the use of his will, and died leaving three sons; and part of the copyhold was of the nature of *Borough-English*. Lord Chancellor: If the copyhold passes, the youngest son, who is intitled to such part of it as is *Borough-English*, must contribute his proportion of the debts. As betwixt the sons it is a doubtful case; but with regard to the creditors if there be not an estate sufficient for the payment of the debts without the copyhold lands, my opinion is, these ought to pass. The words are large enough, a copyhold estate being a *real estate*: But let the master see whether there be not enough without the copyhold for payment of the debts. *Trin. 1718. Drake versus Robinson, Wil. Rep. 443. 2 Eq. Cas. Abr. 232. pl. 10.*

J. S. had given his wife the foul distemper twice; upon which the wife leaving her husband, and coming to town to be cured, borrowed 30*l.* of *Harris* to pay the doctors and surgeons, and for necessaries; afterwards *J. S.* devised some lands for payment of his debts and died. *Per Cur.* Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her cure, and for necessaries, the plaintiff who lent the money must in equity stand in the place of the persons who found and provided such

By a devise of all the real estate for payment of debts, copyholds, though not surrendered, shall pass if not sufficient without them.

Lands devised for payment of debts, money lent the wife to pay for the cure of a disease the testator gave her, must be paid.

necessaries for the wife; therefore let the trustees pay him his money and costs. *Mich.* 1718. *Harris versus Lee, Wil. Rep.* 482. *Salk.* 387. 2 *Eq. Cas. Abr.* 135. pl. 2.

And money borrowed during the testator's infancy, is to be paid.

One *Pitfield*, an infant, being discarded by his father for marrying against his consent; his estate being considerable, but chiefly in reversion, after his father's death, during his infancy borrowed money amounting to 130*l.* and therewith bought some necessaries; and having attained his full age, made his will, devising his real estate to trustees for payment of his debts with interest: decreed that this money actually lent as aforesaid, though during the testator's infancy, was within the trust. *Trin.* 1719. *Marlow v. Pitfield, Wil. Rep.* 558. 2 *Eq. Cas. Abr.* 516. pl. 6.

Whether on a Devise of lands for payment of debts, a debt within the statute of limitations shall be paid?

Blakeway, being a sailmaker, was employed by Sir *Henry Johnson* from 1696 to July 1707. to fit sailcloths and other tackle to Sir *Henry's* ships, on which account Sir *Henry* was indebted to him 343*l.* and in December 1724. *Blakeway* received 50*l.* in part of his debt. Sir *Henry* died 29 Sept. 1719. having made his will and devised lands to his executors in trust to pay his debts: *Blakeway* brought a bill against the administrator, with the will annexed, who pleaded the statute of limitations. Lord Chancellor: I would be cautious of giving any relief against an act of parliament, but it is plain the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do, and if he afterwards acknowledges the debt, it takes it out of the statute: His lordship over-ruled this plea of the statute of limitations. This decree was reversed in the house of lords, and the plea ordered to stand for an answer. *Trin.* 1726. *Blakeway versus The earl of Strafford, 2 Wil. Rep.* 373. *Salk.* 154. 2 *Vern.* 141. See *Cas. in Chanc.* 57. 2 *Eq. Cas. Abr.* 579. pl. 6.

Abraham

Abraham Dedire by his will charged all his estate real and personal with the payment of his debts, and dies, leaving his eldest son executor. As the lands were not devised to be sold for the payment of debts, but permitted to descend charged with the debts, and consequently were legal assets by descent as to the bond creditors, and charged only in equity by the will as to the simple contracts; the question was, whether the bond creditors should not be preferred to those by simple contract? By lord chancellor: As this case is, they shall; but if the heir, before any action brought, had sold the lands, and then the creditors by bond had brought their actions, they should have been paid only their share out of the assets. 3 & 4 Stat. 3 & 4 W. *W. & M. c. 14. Pasch. 1718. Freemoult versus & M. c. 14. Dedire, Wil. Rep. 429. 2 Eq. Cas. Abr. 37. pl. 2. 257. 7.*

Of Devises upon Conditions, Limitations, &c.

WORDS which create a condition are, *upon condition, so that, to the intent to pay, to the effect, &c.* 1 *Inst.* 204. *Hard.* 10, 11. But as to words which make a condition in a will, though not in a deed, *vide* 10 *Co.* 40, 41. and there it was held, that if there be express words of condition annexed to the estate, it cannot be construed a limitation as the words *quamdiu, dummodo, dum, quousque, durante, &c.* but this opinion is now exploded; for though words which properly create a condition be used, yet if the estate be limited over it shall be a limitation. 2 *Brownl.* 65, 66. 1 *Rol. Abr.* 412. 1 *Mod.* 86. And *per Hale* chief baron, there is no other case to warrant the contrary opinion but that of 10 *Co.* 40. and by him it may properly be called a conditional limitation, 1 *Vent.* 199. of which the heir cannot take advantage, though it may determine the party's

estate without entry or claim, which seems to be the chief difference between a condition and limitation; also if lands are devised to the heir at law, upon condition that he pay a sum of money, or do any other act; this, on failure of performance, shall be construed a limitation, though not mentioned; for if it were a condition, no body could take advantage of it, the benefit of conditions annexed to the real estate belonging to the heir, as those to the personal do to the executor. *Cro. Eliz.* 204. 3 *Co.* 22. *Owen* 112. 2 *Mod.* 7. *Lut.* 809.

Devise to the daughter in fee, and if the son pay her 50*l.* he to have the land, this is in nature of a security only.

J. S. devised land to his daughter *E.* and her heirs, and his mind was, that if his son *A.* should pay to her 50*l.* then his son should have the land; the money was not paid at the day, the daughter sells the land. The Lord Chancellor decreed against the vendee, the son paying the money; for he took it to be in the nature of a security; though it was objected by Sir Francis Winington, that this is a contingent devise to the son on payment, and then too, if he had performed and paid, he could have but an estate for life, the remainder or reversion in fee to the daughter. *Bland and Middleton*, 2 *Ch. Ca.* 1.

Devise of lands to *A.* and if evicted, to have other lands; he shall only have so much of the other lands as the part evicted amounts to.

Robert Tyte has issue *Henry*, *James* and *Timothy*; *Robert* gives land called the *Styles* to *Henry* and the heirs of his body, remainder to the right heirs of *Robert*; afterwards *Robert* devises this reversion to *James* and *Timothy*, and the heirs of their two bodies; *James* dies, leaving issue *James*; *Timothy* dies, leaving issue *Timothy* and *Robert*; *Henry* by his will devises the *Styles* to *Robert* his nephew in fee; but if it happen that *James* or *Timothy*, or any other, enter upon *Robert* by virtue of any intail, or other title, then he gave his lands called *Darrow Barns* in fee to *Robert*; *Henry* dies without issue, and *James* the plaintiff being an infant, and *Timothy* enter into *Styles* by the intail, *Robert* enters

enters into *Darrow-Barns*, which is of much greater value. The plaintiff exhibits his bill, and shews that he was an infant at the time of his entry, and still is so; that *Darrow-Barns* was but as a security for the enjoyment of the *Styles*, and that for the moiety of the *Styles* evicted by *Timothy*, the plaintiff is willing to compensate to the value, either in lands or in money. *Lord Chancellor*: I have learned this by the case of *Porter and Fry*, that where a breach or forfeiture is capable of a compensation, equity may relieve, as in this case; but in the case of a condition not to marry without consent there can be no recompence, so no relief. 17 Nov. 1684. *Tyte and Tyte*, Vern. 270.

Legacies given to four grandchildren upon condition, that as they come of age they shall release all claims to the testator's estate; this condition shall be taken distributively, and such only as refuse to release shall forfeit their legacies. 2 Vern. 478.

J. S. had three sons, *William* is eldest, *Nathaniel* his second, and *Daniel* his third son; *William* died in the life-time of the father, leaving issue only a daughter; afterwards the father devised lands to his wife for life, and after her decease to *Daniel* and his heirs; provided, that if *Nathaniel*, within three months after the decease of the wife, pay to *Daniel*, his executors, &c. the sum of 500 l. then the lands to come to *Nathaniel* and his heirs, and died. *Nathaniel* died, leaving the plaintiff his heir, and afterwards the wife died; the plaintiff brought his bill within the three months, praying, that upon payment of the 500 l. the lands might be conveyed to him. The principal question was whether as this 500 l. was to be paid by *Nathaniel* within a limited time, and he dying before that time, his heir could now, on payment of the money, make a good title to the land: It was insisted, that he was not heir at law to the

Legacies to four upon condition to release, they only who refuse shall forfeit.

Lands devised to A. in fee, but if B. within three months pay 500 l. to A. B. to have the land in fee; though B. die before the three months, yet his heir on paying the money shall have the land.

testator; that the condition was precedent, and merely personal in *Nathaniel*, who had neither *jus in re*, nor *jus ad rem*, and could neither have devised, released or extinguished the condition; the word *heirs* was only to denote the quantity of the estate. *Lampet's case*, 10 Co. *Bret and Rigden, Plowden's Com.* For the plaintiff it was insisted, that this was like the common case, *Inst.* 205, 219. *b.* where a feoffment is made on condition, that the feoffor shall before such a day, &c. there if the feoffor die before the day, his heir may perform the condition; the letter of a condition is not always required to be strictly performed. 1 *Ch. Ca.* 89. *Bertie and Falkland*, 3 *Ch. Ca.* 129. That the possibility of performing this condition was an interest or right, or *Scintilla juris*, which vested in *Nathaniel* himself, that he survived the testator, and therefore this differed from *Bret and Rigden's case*, that consequently such right, possibility or interest descended to his heir, and he might perform the condition, as before the statute *de donis*, the possibility of reverter descended to the heir of the donor. *Purfoy and Rogers*, 2 *Saunders* 380. *Cro. Car.* 358. *Cro. Jac.* 591. 8 Co. *Manning's case*. It was decreed for the plaintiff on *Litt.* 334, 335. and the lord chancellor said, that though a condition in law was not deviseable, yet since the statute of uses the devisee may take benefit of it by an equitable construction, and that *Nathaniel* might have released or extinguished this condition. *Mich. Geo. Marks and Marks, Prec. Ch.* 486. *Cases in L. E.* 419.

A precedent condition must be literally performed; but in case of the breach of a subsequent condition, equity will aid if a recompence can be made.

Mr. Rogers devised several manors to *A. B. C.* and their heirs in trust; 1. To pay all his own debts and legacies; 2. And after in trust for *Alexander Popham*, son of *Sir Francis Popham*, for life, remainder to his first, second, third, and every other son in tail, remainder to *Sir Francis* for life in case *Alexander* died without issue male, living

living Sir *Francis*; provided that Sir *Francis* shall settle upon the said *Alexander*, and his heirs male, two thirds of his estate, and upon his refusal to make such settlement, then after the devisor's debts and legacies paid, he devises the land to other persons. Sir *Francis* settles two third parts of his estate on *Alexander* for life, remainder to the first, second, third, &c. sons of *Alexander*, but with a power of revocation. The trustees exhibit a bill against Sir *Francis*, to set forth whether he had made a settlement; he answers, he had settled two parts, and yet should be ready to make such further or other settlement as the court should direct. Counsel was appointed to peruse and consider what was done, or to be done, for a settlement; but before any thing was agreed Sir *Francis* died, he having first made his will, and charged his estate with his own debts, it being before made liable to the debts of his father, and then devises his lands to his son *Alexander* for life, with remainders as before. *Alexander* brings his bill against Mr. *Rogers's* trustees, to compel them to account, supposing profits raised sufficient to pay. The question was, 1. If Sir *Francis* had performed the condition, at least in equity? 2. Whether *Alexander* had such an estate as enabled him to call the trustees to an account? It was objected, that the condition was not performed: 1. Because such a settlement, with a power of revocation, is not such a performance, for he might destroy it. 2. Though it be supposed good if no revocation be made, yet this was revoked by his will, and the settlement by the will was no performance, because the settlement ought to have been made in his life-time. 3. Mr. *Rogers* appoints it to be made to him and his heirs male, which is a fee, and here the settlement is to him for life, with remainders to the first son, &c. 4. If that was according to the intent, yet by his will he has loaded the estate to above the value

value of a third part, so as in truth there is not two thirds settled. *Lord Chancellor*: 1. This limitation in trust for *Alexander* is an estate, and is such a trust as would have been executed in chancery before the statute 27 *H. 8.* and is now executed by that statute, and that mentions trusts as much as uses; but *aliter* where a trust is founded and limited upon upon a use. 2. A precedent condition must be literally performed, for chancery will not vest an estate where the law will not; but where an estate vested is to be divested upon a condition subsequent, there equity will interpose, and lapse of time, &c. shall not hurt; if it be in such a case as we can give a recompence, as if money, or an assurance by such a day, here we can decree him to pay the money, and can give him damages; so we can decree him an assurance, &c. But where the breach is not capable of a recompence, as in the case of *Porter and Fry*, (*Vent.* 199.) where the condition was, that she should not marry without the consent of her grandmother, there is no remedy; here the settlement is a performance in substance, and pursues the settlement and limitations upon *Alexander* made by *Rogers*, but said he would be satisfied if two thirds were left after debts paid. *Nov.* 1682. *Popham and Bamfield*. Upon a re-hearing, *Pas.* 1683. the lord Chancellor continued of the same opinion, and declared, if a compensation was made, he would relieve against the breach of the condition; but in case a sufficient compensation was not made, he would consider farther of it. *Vern.* 79, 167. *Popham and Bamfield*, 344. *Salk.* 236. 3 *D. A.* 237. p. 5. 2 *Vern.* 222, 338. 2 *Eq. Cas.* *Abr.* 308. pl. 12. *Wil. Rep.* 54. pl. 10.

And for this purpose referred it to a master.

Devise of 500 l. to the son, upon condition that the father release; though he refuse, yet if he executes it after-

A feme covert, pursuant to a power, devised lands to her executors, to pay 500 l. out of them to her son; provided, that if the husband give not a sufficient release of certain goods to her executors, then the devise of the 500 l. shall be void, and

go to the executors; after her death a release was tendered to the father, which he refused to execute; yet, upon executing the release afterwards the money shall be paid to the son: For it was said to be the standing rule of the court, that a forfeiture should not bind where a thing may be done afterwards, or a compensation made for it, as where the condition is to pay money, &c. and though it is generally binding where there is a devise over, yet here it being to the executors, it is no more than the law implies. *Cage and Ruffels*, 2 Vent. 352.

The testator devised lands to J. S. upon condition to pay 20,000 l. to his heir at law, viz. 1000 l. per Annum for the first 16 years, and 2000 l. per Annum after till the whole should be paid; 1000 l. being in arrear, the heir enters. It was held, that J. S. should be relieved upon paying the 1000 l. with interest; the court declaring, that they would relieve wherever they could give satisfaction or compensation for the breach of the condition. *Grimston and lord Bruce*, Salk. 156. 2 Vern. 594. *Barnardiston and Fane*, 2 Vern. 366.

The testator having three daughters, devised lands to the eldest, upon condition that within six months after his death she should pay certain sums to her two other sisters; and if she failed, then he devised the lands to his second daughter, &c. It was held, that the court might enlarge the time for payment, though the premisses were devised over; and that in all cases which lie in compensation the court may dispense with the time, though even in case of a condition precedent. *Woodman and Blake*, 2 Vern. 222, 166.

The testator devised to each of his daughters 20,000 l. payable at the age of twenty-five years; but if they, or either of them, married before the age of sixteen, or if the marriage was without the consent of their mother and trustees, then they should

wards, the son shall have the money.

Lands devised on condition to pay the heir 1000 l. per annum; if the heir enters for breach, the devisee shall be relieved on paying the arrears and interest.

Devise to one child, on condition to pay a sum to another, or the other child to have the land; the time of payment may be enlarged by the court.

Devise of 20,000 l. to A, but if she marry before sixteen, or without consent 10,000 l. to go

over to another, A. marries before sixteen, but with consent. should lose 10,000 l. of the portion which should go to the other children; one of the daughters married before the age of sixteen, but with the consent of her mother and trustees; yet the lord keeper held, that both the terms of the condition ought to be observed. Lord *Salisbury* and *Bennet*, 2 *Vent.* 365. *sed vide* 2 *Vern.* 223. and *Skin.* 285. S. C. *contra*.

Devise to the heir for life, in case within three years she married G. and then to their first and other sons in tail; in default of such issue, or in case the marriage do not take effect, then F. to take.

Mr. *Cary* devised lands in trust for Mrs. *Willoughby* (who was his heir at law) for her life, in case within three years after his death she married lord *Guildford*, and then to the eldest and other sons of Mrs. *Willoughby* by lord *Guildford* in tail male; but for default of such issue, or in case the said marriage should not take effect within the three years, then the trust was devised over to lord *Faukland*. Mr. *Cary* afterwards by a codicil declared, that if the marriage between lord *Guildford* and Mrs. *Willoughby* took effect before the age of consent of both, or either of them, it should be of no avail unless it was confirmed by both parties at their age of consent. Mr. *Cary* died, lord *Guildford* and Mrs. *Willoughby* were both under the age of consent, but when they came of age to consent, and within the three years, several proposals were made by Mrs. *Willoughby*'s friends to lord *Guildford*'s guardians, requiring a settlement, which terms were not accepted of by them; and the three years being expired, Mrs. *Willoughby* married lord *Berty*, son of the earl of *Abington*; lord *Berty* and his lady brought their bill against lord *Faukland* for the benefit of this devise; for that no default appeared in Mrs. *Willoughby*, who had pressed the marriage as far as the modesty of her sex would allow. *Somers* lord chancellor, assisted by *Holt* and *Treby* chief justices, dismissed the plaintiff's bill; for that this is a condition precedent, and if it had become impossible by the act of God, as by the death of lord *Guildford* within the three years,

years, the plaintiffs could have had no relief. The intent of the testator was not to give her the estate upon any act in her own power solely, but in case the marriage took effect, to which there must be the consent of lord *Guildford* as well as the lady, and therefore if lord *Guildford* had absolutely refused, though she had consented without any terms, it would have been the same thing. The marriage was the only consideration of the gift. When infants take by will, they are bound as strictly as other persons. Where such things as are to be performed can be valued, as conveying an estate, or paying money, this court can relieve, because it can make amends for want of time, and other circumstances; so in the case of a condition subsequent, equitable considerations may govern; but it is otherwise in the case of a condition precedent, where nothing ever vested; if a condition subsequent become impossible by the act of God, the party shall have the estate; but it is otherwise in the case of a condition precedent. Lord *Berty & Ux' v. lord Faulkland*, 2 *Vern.* 333. *Salk.* 231. 3 *Ch. Ca.* 129. But this decree was reversed in the house of lords, in an adversary manner, as appears by the journal.

The testator devised 8000 *l.* to *A.* provided she married with the consent of *B.* otherwise she should have but 100 *l.* *per Annum.* *A.* married without the consent of *B.* It was held, that this proviso was but *in terrorem*, to make the person careful, and that it would not defeat the portion. *Bellasis and Ermin*, *Ch. Ca.* 22. 2 *Ch. Rep.* 23. *Vern.* 20. *Nel. Ch. Rep.* 145. 2 *Vern.* 293. But if the testator, in case of *A.*'s marrying without the consent of *B.* had limited the portion over to another, it had been otherwise. 1 *Ch. Ca.* 20. 2 *Ch. Rep.* 95. 2 *Vern.* 357. The testator devised to his daughter 100 *l.* to be paid upon her day of marriage, or age of twenty-five, which should first happen, upon condition that she should marry

Where a devise, upon condition not to marry without the consent of another, is binding.

marry with the consent of *A.* and *B.* and if she married without their consent, then to have 50*l.* and no more, and gave the residue of his personal estate to other persons; the daughter married without such consent before she was twenty-one. It was held that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over of the 50*l.* on the daughter's disobedience. *Mich.* 1699. *Amos and Horner*. A devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void by our law, whether there be a limitation over or not; but if it be upon condition not to marry a papist, or a certain person by name, it may be good. *Vern.* 20. By the civil law, all conditions against the liberty of marriage are unlawful. *Swinburne*, p. 4. *sect.* 12.

A sum limited in trust for a feme, in case she did not marry contrary to the liking of *E.* if she did, then the sum at the disposal of *E.* she marries without his consent, *E.* cannot dispose of the money but for her benefit.

900*l.* was secured by a lease for years to Sir *E. W.* and his lady, in trust for a feme sole, in case she did not marry contrary to the liking of Sir *E.* and his lady, and if she did, then to such persons as Sir *E.* and his lady, or the survivor of them, should nominate, and for want of such nomination, then to Sir *E. W.* and his lady, or the survivor of them; the feme sole married without their consent. It was held, that Sir *E.* and his lady could not dispose of this lease otherwise than for the benefit of the feme. *Fleming v. Walgrave*, *Ch. Ca.* 58. 1 *D. A.* 752. p. 5. *vide* 2 *Vern.* 573. where a difference is taken between a condition not to marry without consent, and a condition not to marry against consent.

Lands devised to *A.* in tail, provided she marry with the consent of her grandmother and two trustees; if she marry without their consent, the lands to go to *P.* in fee; *A.* marries without such

The earl of *Newport* devised to the lady his wife *Newport-house*, and all his lands and tenements in *Middlesex* for her life, and after her decease to his grand-daughter the lady *Anne Knowles* in tail, provided that she marry with the consent of his said wife, and the earls of *Warwick* and *Manchester*, or the major part of them; and in case she married without such consent, or died without issue of her

her body, then he gave the premisses to his grandson *George Porter* and his heirs. The earl dies. The lady *Anne* being fifteen years of age, and having no notice of the condition marries *Fry* without consent; but upon proof it appears, that after the marriage the countess sent for the lady *Anne*, and entertained her, and that before the marriage the countess proposed the lord *Morpeth* to lady *Anne*, but she refusing the countess said she would propose no more matches, nor concern her self in her marriage; the earls of *Warwick* and *Manchester* after the marriage gave their consent to it, and say, perhaps they should have consented if they had been asked before. The countess dies, and *George Porter* enters for breach of the condition; the lady *Anne* and her husband bring a bill to be relieved against the condition. The cause was heard upon an appeal from the master of the rolls, before *Bridgman* lord keeper, *Kelyng* and *Vaughan* chief justices, and *Hale* chief baron. *Hale* considered, 1. If the condition or limitation in the will be good? 2. If there be relief in equity? 3. If there shall not be relief against such conditions or limitations generally, yet whether this particular case in question hath such circumstances as merit relief? As to the first he held it a good conditional limitation in law and equity, and that it absolutely determines the estate of the plaintiffs, and vests the premisses in the defendant, 1. Because it is a collateral limitation of the land, and no restraint of marriage. 2. Because the lady is not bound to any thing but her duty to be advised by her grandmother who is *in loco parentis*. 3. It was in the power of the earl *Newport* to dispose of his estate upon what condition he pleased; and though such limitation of a legacy be not good by the ecclesiastical law, as *Swin. p. 4. sect. 12.* yet the devise in question is different, because this respects lands and inheritance, and not personal things, as legacies; therefore the estate

consent, but the grand mother and trustees consent afterwards, yet P. shall have the lands.

estate vested by the limitation over shall not be defeated. 2. He held, that in general there shall not be relief against such conditions or limitations, but not for the reason that the estate is settled by will, and so hath the sanction of an act of parliament, 32 H. 8. c. 1. which inables a devise of lands; for he held that there might be relief against breaches in wills, else many estates in *England* would be unfettered; and for this he cited *Bish* and *Seaman's* case in chancery, — *Car.* 1. and *Salmon* and *Burtman's* case, 6 May 12 *Car.* 1. Nor upon the reason, that it is a limitation, and not a condition, for there may be relief against a limitation. 3. He held, that there should be no relief in this particular case, considered with all it's circumstances. 1. Because it is not like to a condition, or limitation of an estate for payment of money at a certain day; for upon non-payment at the precise day, there may be a compensation by payment at another day; but in this case there can be no compensation for marrying without consent. 2. Because it is a condition to contain the lady in due obedience to the law of nature and reason. 3. Because the settlement by the earl of *Newport* was voluntary to the plaintiff and defendant; and both being *in æquali gradu* to the devisor, there is no equity to take away the estate, vested by the law in the defendant, and give it to the plaintiff, in a case of such parity. 4. Because it appears, by the body of the will, that the devisor's intent was, that the estate given to the plaintiff should go over to the defendant, as well if the plaintiff married without consent, as if she had died without issue, he having made the same limitation for the one as for the other, and therefore the same reason to relieve for the one as for the other. 5. Because this is without precedent, none of the precedents produced being like it, and therefore he agrees here with the reason of the judges in *Manning's* case, 8 Rep. 94. and
Lampet's

Lampet's case, 10 Rep. 47. to bound themselves how far they will go in construction and admission of such estates, and to give themselves bounds and limits that they will not exceed; and also though precedents make no intrinsic variation in equity, where there is parity of cases, yet they often enlighten and furnish with reason. He said, that by the ordinary distributive justice of the land this case is not relievable in equity; for a court of equity ought not to relieve in all cases, but to be confined and limited within certain bounds, for parliament only is of an unlimited jurisdiction. As to the allegations offered for the plaintiffs, 1. That this proviso was *in terrorem* only; he said he was not satisfied with it, for it is a collateral averment against the express words of the will, and if such averments shall be admitted, great incertainty and confusion will be introduced. 2. That the effect of the testator's will is obtained by the subsequent assent, but this he held no answer; for the dissent of the trustees *ex post facto* would be vain, and they cannot tell of what opinion they should have been if they had had the contemplation of this marriage; and if the variation from the will had only been in point of circumstance, there might have been pretence of equity, but here it is in substance. 3. That the lady was an infant at her marriage; he said, that this is no reason at all; for the condition depends upon an act which is in the sole power of the infant, and infants are bound to perform conditions in fact, as this is. 4. That the lady, being an infant, had no notice of the condition; he said, that notice or not notice was not triable here, but in a court of law; and therefore if the plaintiffs have title it may be tried at law, upon the point of notice, for public intimation in the house may amount to notice in Chancery. But if notice be necessary in this case, it ought to be legal notice, which is only

determinable upon a trial at law; so he concluded against the plaintiffs, leaving the point of notice to the law. *Vaughan*, That the plaintiffs, were not relievable; he agreed that where to pay money at a day, there is equity, because there may be a recompence, but cannot be here. That such a condition for personal legacies are void, but this case is ruled by another law. But he relies upon the sanction and sacredness of the act of parliament, 32 *H. 8. c. 1.* that every one shall have free liberty, by his will in writing, to devise his lands for any estate at his free will and pleasure, and that this will made in observance of this act, cannot be altered by a decree of this court; and that the act respects this will as strongly, as if the estates devised had been confirmed by a particular act of parliament; and if notice or consent are necessary, they are determinable at law: Also consent and dissent ought to have an object whereupon to operate, and to be in the power of a man to assent or dissent, which they had not in this case after the marriage, for the dissent was then in vain, and none knows of what opinion he should have been, &c. *Kelyng*: It is unreasonable to give relief here, for it would destroy the prudence of parents, and introduce disobedience of children, and corruption of persons intrusted with heiresses; and it is most equitable that these bonds and obligations upon children should be held firm. He agrees, that where there is a limitation over upon default of payment at a day, there may be relief, for all cases upon wills are not irremediable in equity; for if in matter of circumstance, as in *Yelverton's case*, 36 *Eliz. Totbil* 226. Condition not to marry without consent in writing, and she has consent but not in writing, that is helped, but here is matter of substance. He held, that if the trustees were obstinate, and without good cause refused to assent, they are compellable in equity. And infancy is not relievable, for that
would

would destroy the care of parents; and, at common law, if an infant ward married without assent, &c. he lost the value of his marriage; and he said this was a good, just and prudent condition, and not to be violated in law or equity. *The lord keeper* agreed in all, and said he was satisfied, and delivered from an error, that parents could not restrain their children from marrying without consent; but said there were three things considerable to move the master of the rolls to make this decree 1. The defendant had 5000*l.* legacy by the will, and the plaintiff nothing. 2. The subsequent assent of the grandmother and trustees, such as it was. 3. That no time was limited in which the trustees shall give their consent. And he said that notice was not necessary; for every one must take notice where none is to give it, especially where she is not heir. Also an act of parliament may be defeated by course of law; as if an act intail lands on *A.* remainder to *B.* *A.* may dock the remainder by recovery: The plaintiff's bill dismissed. 13 May 1670 *Fry and Porter*. The plaintiffs appealed to the house of lords, but the decree was affirmed. *Mod.* 300. *Cha. Ca.* 138. 2 *Ch. Rep.* 26. 1 *D. A.* 752. p. 8.

Charles Withers the testator devised to *Charles* his eldest son, and his heirs, all his lands, &c. in the county of *B.* except certain part thereof charged with the sum of 2500 *l.* to *Mary* his daughter, at her age of 21, or day of marriage, which should first happen, and he devised the excepted lands to trustees to be sold for payment of his debts, *Provided that if his said daughter should marry in the life-time of her mother without her consent first had in writing 500 l. of the said 2500 l. should cease, and be applied towards payment of his debts charged upon the excepted lands, and appoints his wife guardian of his said daughter, and makes her executrix.* The daughter, after she had attained

Portion of 2500*l.* devised to a daughter, to be raised out of lands payable at 21 or marriage; but if she married without her mother's consent, 500*l.* to go towards payment of debts: The daughter after 21 marries without her mother's consent, yet shall have the whole.

the age of 21, without the consent or privity of her mother intermarried with *William King, Esq;* who was a gentleman of estate, but had made no settlement or provision for his wife; wherefore the son refused to raise or pay any part of his sister's portion, and insisted likewise, that by her marriage without her mother's consent 500*l.* of her portion was forfeited. *Lord Keeper:* This portion did not vest in the daughter, presently, but it is given to her at her age of twenty-one, or marriage; before then no right or interest vested in her; she has attained her age of twenty-one, this legacy is to be raised out of lands, and must have the same construction as a devise of the lands themselves would: The distinction, that where there is no devise over, the condition shall be only *in terrorem*, is a great deal too wide; here in effect is no devise over, for though it be to go towards the payment of debts yet here no creditors appear to be concerned, none that are in danger of losing their debts: The testator appointed two days of payment, marriage or twenty-one, and which of them first happened gave her a right to it: She has attained her age of twenty-one and that singly gives her a right to it: Indeed if she had married before that age, she must have had her mother's consent, otherwise she was to lose 500*l.* But when she attains her age, her title to the whole is accrued, and is not to be impeached by her marriage without her mother's consent; for as her marriage with her mother's consent was one title, so her attaining her age of twenty-one was another title; therefore there must be a decree for sale of so much of the lands as will be necessary for that purpose, unless the defendant will otherwise secure the payment of it; but the money when raised must be brought before the master till the plaintiff makes a settlement on his wife. *Hil. 9 Anna, King v. Withers, Gilb. Rep. 26 3 Wil. Rep. 414. pl. 116. See Chanc. C. 22, 58,*

138. 2 Chanc. 23, 95. Vern. 20. 2 Vern. 293, 357, 452, 572, 720. Cas. Temp. Taib. 117. Prec. in Chanc. 348. Eq. Cas. Abr. 112. pl. 10. 2 Eq. Cas. Abr. 659. pl. 10.

The testator gave his granddaughter 200 l. upon condition that she continued with his executors till she was twenty-one years of age; but if she was taken from them by her father (who was a papist) or married against the consent of his executors, then he gave her but 10 l. The granddaughter was placed by the executors with a clergyman, who, before she was twenty-one, with the consent of one of the executors, permitted her to make a visit to her father, and he took that opportunity to marry her to a papist. It was held that she should have but 10 l. only, and that there was no difference between a condition that she should not marry without consent, and a condition that she should not marry against consent. *Creagh and Wilson*, 2 Vern. 572.

Legacy of 200 l. to A. but if she married against consent of executors, to have but 10 l.

Lands were settled in trust for raising daughters portions, payable upon their marriages with consent of trustees, but if they married without such consent, then to remain over to another, &c. The daughters were old, and never intended to marry, but to lay out their portions in the purchase of annuities for their lives. It was held that they should have their portions immediately, upon giving security to indemnity against the persons to whom the securities were devised over. *Needham and Vernon*, Nels. Ch. Rep. 62. 2 Vern. 452.

Legacy payable at marriage with consent, &c. paid immediately on giving security.

Generally by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species. 2 Burn's Eccle. Law 570.

Devise in restraint of marriage.

So if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, this is rejected as unlawful. *God. Orph. Leg.* 45.

But if the conditions are only such, as whereby marriage is, not absolutely prohibited, but only in part restrained, as in respect of time, place, or person; then such conditions are not absolutely rejected. *id. ibid.*

So if the condition be not to marry before the age of twenty-one years, this condition is to be performed; otherwise, if it is continued to an unreasonable length. 2 *Burn's Eccle. Law* 57.

So if the condition be, not to marry such a particular person, or a widow, or of one particular place or the like. *id.* 571.

Generally, in the temporal courts, the distinction seemeth to have been, where the legacy is devised over to another, and where it is not devised over: in the former case it hath been held, that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over it hath been held, that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy. *Cha. Ca.* 22. *Vern.* 20. 2 *Vern.* 293, 357.

And upon this foundation the case of *Harvey* and *Aston*, *M.* 10 *Geo.* 2. before the master of the rolls, seemeth to have proceeded: The case was Sir *Thomas Aston* by settlement after marriage created a term in trust by mortgage or sale to raise 2000 *l.* for each of his daughters portions, "Provided they marry with their mother's consent, and if either die before the marriage with such consent, her portion to cease, and the premises to be discharged; and if raised, then to be paid to the person to whom the premises should belong:" And afterwards by will created another trust term to augment their fortunes 2000 *l.* a-piece more, but *subject to the condition as in the settlement*, and gave the residue over and above the 2000 *l.* a-piece to his wife: And by a codicil created another trust term for the better raising of his daughters portions.

portions. Sir *Thomas* died leaving two daughters, one of them married after the age of twenty-one, the other before the age of twenty-one, and both of them without the consent of their mother. The master of the rolls decreed, that the portions should be paid notwithstanding; proceeding upon a supposition, that the portions by these words were not devised over. *Cha. Ca. Talb.* 212.

But on an appeal from this decree, the lord chancellor *Hardwicke*, assisted by the two chief justices *Lee* and *Willes* and the chief baron *Comyns*, reversed the decree; and the arguments urged by the court for this reversal seem to proceed upon a supposition, that the proviso or limitation shall be good, whether the portions be devised over or not. Namely, first, that it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner, and upon what terms and conditions he pleaseth. Secondly, that it is an established maxim of law, that if an estate in land, or interest out of the land, is limited to commence upon a condition precedent; nothing can vest or take effect, till the condition is performed. And this is so strong and so settled a point, that although the previous act was at first impossible by the act of *God*, or other accident, the estate can never vest. Thirdly, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who appointed the trust. It is said, that a trust is to be construed favourably: And it is true, it is to be construed with as much advantage as may be to make good and answer the intent and design of the party, but it is to be construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with the mother's consent, that the court should

direct them to pay the money before that time. Fourthly, that a restraint in the present case is not only lawful, but prudent and reasonable; and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage. *Com. Rep.* 744. *Atk. Rep.* 361. pl. 172.

And upon these principals the statute of the 26 *Geo. 2. c. 33.* seemeth afterwards to have been established; which, in case of a person under twenty-one years of age marrying without the consent of parents or guardians, renders the marriage itself null and void. 2 *Burn's Eccle. Law* 572.

Bill for payment
of a legacy against
defendant as
executor.

This was a bill, brought for a payment of a legacy, against the defendant as executor of *John Hyett*. *John Hyett*, by will 5 *Sept.* 1719. *inter al*, devised unto the plaintiff *Elizabeth*, by the name and description of his grand-daughter *Elizabeth Hyett*, the sum of 2500 *l.* to be paid her when she should attain her age of twenty-one years, or be married with the consent of his executors or the survivor of them; and such consent to be testified in writing under their hands, and not otherwise.

The testator also gave and bequeathed unto the plaintiff *Elizabeth* the annual sum of 100 *l.* for the term of five years, to commence from and after marriage with the consent of his said executors and trustees, as aforesaid, if the plaintiff should so long live. The first of which said annual payments he willed should begin and be made unto the plaintiff at the expiration of the first year after such her marriage with consent, as aforesaid. The plaintiff *Elizabeth* intermarried with the plaintiff her husband after she attained the age of twenty-one years; and the executors paid the legacy of 2500 *l.* because the words as to that were in the disjunctive, *viz.* when she attained her age of twenty-one years, or be married

ried with the consent of his executors. So that the assent of the executors was not necessary, in case [unless] she married under the age of twenty-one years.

And the question was now as to 100*l.* for five years; and it was insisted, she having married the plaintiff without the consent of the executors, she should never be intitled to the said 100*l.* for five years. Though in this case there is no limitation over in case she married without consent; yet this is not a restriction only in *terrorem*, but is a condition precedent; and a court of equity cannot dispense with the non-performance of a condition precedent. The words are, "To commence from and after such her marriage with consent of his said executors and trustees as aforesaid;" and that has reference to the former words where the consent is directed to be testified in writing.

King, chancellor, inclined to be of opinion, that the plaintiff *Elizabeth* by her marriage without consent, &c. had lost this legacy of 100*l.* for five years, and that this was a condition precedent; but the residuary legatee, who was an infant and heir at law, not being before the court, it was ordered to stand over. *Vide 2 Vern. 293. Garrett & Ux v. Pritty & al. Note*; This is not a gift defeasible on a condition subsequent, but to commence upon the performance of an act which was to be performed. *2 Vent. 339. 2 Vern. 572. 2 Keb. 1. pl. 1.*

J. S. charged his real estate with 500*l.* to be paid his sister *Alice Herne*, within one month after her marriage, but so nevertheless as she married with the approbation of his brother *Joseph Herne* (if living), and in case she married without his consent, the 500*l.* was not to be raised. *Alice Herne* married in the life-time of *Joseph Herne*, and without his consent, and the question was, whether she was intitled to the 500*l.* or not; for here it

was

was said that this was a condition only *in terrorem*, and that the construction of such conditions has always been, that where there is no devise over such condition is void, otherwise where limited over; and here it is not.

Econtra it was argued that this is a condition precedent, and nothing arises or becomes due but upon the marrying with consent, and that this being a devise of money out of land, or of a charge upon the land, it is to be considered as a devise of land, &c. and governed by the same rules, and then being a plain condition precedent nothing does arise, &c. and for this was cited the cases of *Fry v. Porter*. *Bertie and Faulkland*, &c.

The master of the rolls said, that the civil law makes no distinction, in *personal* legacies, between conditions precedent and subsequent, neither does this court as to meer personal legacies given upon condition of marrying, &c. with consent, &c. But *this court differs from the civil law in this, that whereas by that law all conditions in restraint of marriage are void; but this court says they are not void where the legacy is given over, and another person particularly substituted by the testator to have the benefit of it, in case the condition be not complied with; but this must be a special nomination as a legatee, and therefore a residuary legatee or executor should not have the benefit of such non-performance, and remembered a case to this purpose, that where a legacy given upon such condition of marrying with consent, and if not, that it should sink into the residue of testator's estate which he gave to J. S. &c.* It was held that though the marriage was without the consent, yet the legacy was not lost, because it would have been the same, if testator had said nothing about its sinking into the residuum, and therefore was construed *in terrorem*. So it is in the case of a trust of a term limited of lands for raising portions, with such restrictions, this court governing itself by the same rules as in case of a devise

devise of a legacy with such condition, because though the term be a legal estate and interest, yet the trust of the term is a creature of equity only.

But it is otherwise in case of a devise of lands; there conditions precedent, and subsequent take place, &c. and this was *Fry and Porter's* case of an infant bound by condition, relating to her marriage, being a condition precedent, and held that the present case being a charge upon land is to be governed by the same rule, and is to be considered as land; the will must be attested in the same manner, &c. and this being plainly a condition precedent, and nothing vested (as is in the case of a trust term, where the term is vested, and the trust only left open), it is too hard for this court to charge the land contrary to the express will of the testator, and to say the money should be raised when the testator has said it shall not, &c. otherwise than as a devise of the land itself; wherefore the bill was dismissed as to this point. For *Alice* the legatee were cited *Salisbury v. Bennet*, 2 Vern. Cha. Ca. 22. *Bellasis v. Ernin*, and *ibid* 58. *Fleming v. Waldgrave*. But as to this it was said by Mr. Attorney General, and agreed by his honour, that the legacy there vested immediately, it being given upon her not marrying without consent, &c. and his honour remembred a like case in time of *Wright* S. C. where the condition being, if she did not marry with consent, &c. and the legacy was decreed her immediately, and she to enter into a recognizance to refund in case she married without consent, &c. *Rep. Reves v. Herne*. 5 Vin. Abr. 343. pl. 41.

Mr. *Bobun* having four daughters *A. B. C.* and *D.* makes his will in 1705, and thereby devises several parcels of his estates severally to his four daughters, and *inter al'*, he devises to trustees all his lands, tenements and hereditaments in *E.* and *E.* or either of them, or near thereto adjoining, in trust for his daughter *A.* until her marriage or death,

death, and in case she marries with the consent of her trustees, then for her and her heirs, or for such person as she shall appoint, &c. But in case she should marry without consent of her trustees, and forfeit her estate, then to her other sisters equally between them, &c. afterwards in 1708, the plaintiff Clerk marries A. with the consent and approbation of her father Mr. Bohun, and he settles upon the marriage (his wife, joining with him, who had these lands in jointure) part of these lands devised to her by his will after the death of her mother, and also 7 l. per ann. fee-farm rent, which was doubtful if passed by the will or not.

Afterwards in 1709, Mr. Bohun the father dies without altering the will.

Note, Mr. Bohun in a letter to Mr. Clerk upon the treaty of marriage, declares what he will give with his daughter in present, and that she will be a better fortune at his death.

1. Quære, if this devise to his daughter A. in fee, upon condition of marrying with consent of the trustees be dispensed with, or performed by her marrying in her father's life-time, and with his consent?

2. Quære, if the father giving and settling upon his daughter A.'s marriage part of the lands, devised to her by the will precedent to the marriage, be a revocation of the whole devise to her, or only *pro tanto* as was settled on her upon the marriage?

It was argued for the defendant, that this was a condition precedent, and till performance the estate cannot vest, that it was not performed by her marrying with her father's consent, that conditions precedent are not aided by a court of equity, but must be strictly performed before the estate will vest either in law or equity, and to this purpose the cases of *Fry and Porter in Vent.* and *Berty and lord Falkland in Dom. Proc.* were cited.

As to the second point they argued, that this settlement of part of the lands devised to her by her father upon the marriage, and the seven pounds *per annum* fee-farm rent, (which they insisted was not included in the devise to her) was a revocation of the whole devise to her. There are two sorts of revocations, viz. *expressed and implied*. *Implied* is either where the testator does some act subsequent to the devise, which is inconsistent with, and renders the devise impossible to take effect; or where the testator does some act which apparently shews his mind to be altered since the making the will, and that this case comes within the last of these rules, for at the time of making the will, Mr. *Bobun* considered his daughter *A.* as a child wholly unprovided for, and gives her those lands as her whole provision, and as to a child who never had any portion from him, and therefore at the time of making his will, *A.* was to be considered in a different view from what she was at the time of his death, when she was married and had received a portion; and it cannot be supposed that a father would make the same provision for a married daughter who has had a portion, as for a maiden daughter who never had any thing from him.

They admitted that her marrying with her father's consent in his life-time, cannot be a forfeiture, so as to vest the estate in the devisees over, but the estate will descend as undisposed of, and so she come in as one of the co-heirs to her father, for a fourth part.

But it was insisted on for the plaintiff, first that by the marriage in the life-time of the father, and with his consent, the condition in the will was dispensed with by the act of the father, who did annex the condition to the devise; or else the condition was performed in substance by the marriage with the father's consent; and where the substantial part and intent of the condition is performed,

performed, equity will supply the defect of circumstances; and so one way or other the estate did vest by the devise.

As to the second point it was insisted, that the lands given by the father in his life-time with his daughter in marriage, though after the will made, was not a revocation of the whole devise to her, but only for so much thereof as was settled by the father upon her marriage. When Mr. *Bobun* made his will, he took into consideration the whole affairs of his family, viz. The number of his children, and the quantity and parts of his estate, and allotted such proportions to each child as he thought proper. He lived a year after *A.*'s marriage, and if he had designed that his daughter *A.* should have no more of his estate than what he gave with her in marriage, in all probability in all that time he would have altered his will accordingly, which is a strong presumption that his mind continued, that his daughter *A.* should have all the lands devised to her by the will, and his giving her part of them in his life-time, is no argument why she should not have the rest at his death according to the will.

Suppose a father by his will gives his daughter 10,000 *l.* and afterwards marries her, and gives her 5000 *l.* for her portion, and then dies without revoking his will, this is clearly not a revocation of the whole devise of 10,000 *l.* but only revocation or satisfaction *pro tanto*, viz. 5000 *l.* and she shall take the other 5000 *l.* by the will, this is a plain case, and the same in reason as the present case.

Cowper, chancellor, was of opinion, that by the marriage with the consent of her father, the condition is dispensed with, and the devise becomes absolute; for conditions of this kind, be they conditions precedent or subsequent, are in nature of penalties and forfeitures; and if the substantial part and intent be performed, equity should supply small defects and favour the devisee. It is admitted here is no forfeiture, and shall I take away the estate

estate from the first devisee, when it cannot go to the devisee over, only to let it descend to the heirs at law, which certainly was never the intent of the testator.

As to the second point, he held that the lands settled by the father upon the marriage of his daughter *A.* is a revocation only *pro tanto* of the lands devised to her, and not of the whole devise; for implied revocations ought to be plain and certain, and the inconsistency most apparent, which is not so in this case; for why may not the father give his daughter all these lands at his death, though it was not proper for him to part with them all in his life-time; though he gave part by deed, why may he not give her the rest by will?

Decree for the plaintiff the wife for all the lands devised to her by the will. *Clerk and Ux' v. Lucy & al'*, 8 *Vin. Abr.* 154. *pl.* 11.

Testator devised out of lands a legacy of 500 *l.* to his niece, provided, that she should not marry in the life-time of his wife without her consent, and if she did, the legacy to sink into the estate for the benefit of the devisee of the land. The niece married in the wife's life-time directly against her consent; and it was insisted, that there being no limitation over, the direction that it should sink not amounting to one, (refers to 2 *Vern.* 293.) this proviso was only *in terrorem*, and did not forfeit the legacy. Sir *Joseph Jekyll*: This is a devise out of lands, which is different from personal legacies; the legacy is become forfeited; and so the plaintiff's bill must be dismissed. (Refers to *Mod.* 300. 2 *Vern.* 333. *Roll. Abr.* 418. *pl.* 6.) *Sheriff and Morlock.* 2 *Eq. Cas. Abr.* 546. *pl.* 23.

This cause came by appeal from the *Rolls*, where the plaintiff's bill was dismissed with costs. And the case was, that *Thornton*, Mr. *Berry's* uncle, after devising the interest of his personal estate to defendant's mother for her life, and some legacies, had these words in his will: "*And then as to the*

residue,

residue, I give the same to my niece, provided she marry with the advice and consent of Mrs. Lyddell and Mr. Clerk, and if she married otherwise, be devised the same to the plaintiff Painter." Clerk died in 1717; and afterwards in 1729 Mrs. Berry intermarried without any previous application made to Mr. Lyddell the survivor, and this bill was brought to have the residue paid to the plaintiff. For the plaintiff was cited *Vent.* 199. and *Berty v. Falkland*, 2 *Vern.* that this was a condition precedent; and though the lady could not have the joint consent of both persons by reason of Clerk's death, yet the consent was a condition precedent, and it was her uncle's intent to give them the care over her, which she ought to have performed as near as she could. *King*, lord chancellor: On the death of the defendant's mother, the residue of the testator's personal estate vested in the defendant, and could not go over to the plaintiff; but in case of her marriage contrary to the direction of the will, if the residue did not vest, the testator as to this must be said to die intestate; the proviso therefore is a condition subsequent, and to divest an interest; but the death of Mr. Clerk made the joint consent impossible, and such consent is not, as was said, an interest that can survive, but a naked power; and there can be no doubt but a condition subsequent, becoming impossible by the act of God, must be dispensed with. So the decree was affirmed as to the principal matter, and reversed only as to the costs. May 6, 1732. *Painter and Berry et Ux' et administratrix of Thornton*, Eq. Cas. *Abr.* 548. pl. 26.

This case arose upon the words of two wills, the one made by the father, and the other made by the mother of *Mary Gregdon*, the plaintiff in the cross-bill.

The father's will, "I give the sum of 1000 l. to my only daughter *Mary Gregdon*, to be paid her at her age of twenty-one years, or on the day of marriage,

marriage, which shall first happen, provided she marry by and with the consent of my executors; but in case she dies before the money become payable, on the conditions aforesaid, then I give the said 1000*l.* equally between my two youngest sons, *Benjamin* and *Gregory Graydon*. Mrs. *Mary Graydon*, grandmother of *Mary Graydon*, *Mary Graydon* the mother, and Mr. *Jeremy Gregory* the uncle, to be my joint and sole executors."

The mother's will. "Item, I give to my daughter *Mary Graydon*, all my wearing apparel of all sorts, with all my dressing plate, jewels, watch chain, &c.

"Then my will is, that in case my daughter *Mary Graydon* shall marry before she comes to the age of twenty-one years, without the consent and approbation of my executor, under his hand first had and obtained, (if he be living) *that then she shall not be intitled to any part of such legacies as I have herein left her, but that whole share shall be equally divided amongst my sons Benjamin and Gregory Graydon; the residue, after her debts and legacies paid, she gives to her three children Benjamin, Mary and Gregory, equally to be divided between them, or the survivors of them, share alike, and appoints her son John Graydon to be her sole executor.*"

The bill was brought by the plaintiff in the original cause, against the defendant *Hicks*, as the husband of *Mary Graydon*, to relinquish the 1000*l.* which was left to the wife under the will of the father, she having married without the consent of the executors, and contrary to the direction of his will, and likewise to relinquish the legacies under the will of the mother.

The executors under the will of the father were all dead before the marriage of Mary Graydon.

And *John Graydon*, appointed executor under the will of the mother, and who was to give his consent to *Mary Graydon's* marriage, renounced the

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executor-

executorship in the most formal manner, in the ecclesiastical court.

The cross bill was brought by *Mary Graydon*, as a feme sole, against the plaintiff in the original cause, as one of the devisees over, under both wills, in case of *Mary Graydon's* marriage without consent, and likewise against Mr. *Timewell*, who took out administration to the mother, on the executor's renouncing, and likewise administration *de bonis non* to the father.

Lord chancellor. This case comes before me under very extraordinary circumstances; it is a melancholy consideration that some of the parties should be so void of honour and decency, and in the first place that a child should pay so little regard to the direction of parents; but I do not sit here to determine upon the moral character and moral behaviour, but I must determine upon the rights only of parties.

The first question is, whether *Mary Graydon*, the plaintiff in the cross cause, is married or not.

Secondly, if she is married, what effect that will have both in respect to the will of the father and mother.

As to the first question I must take her to be married, and should do her a great injury if I did not, but here is such evidence, as would induce any jury to find the marriage; if there was the least doubt, I ought to direct an issue to try that fact; but there is no room for it in this case, as not the least evidence on the part of the defendant *Mary Graydon* has been offered to make it doubtful.

The previous step towards a marriage was Mr. *Hicks's* courtship, and an application to the administrator Mr. *Timewell*, upon that footing; he said likewise to two persons, when he was asked if he was married, that he chose to conceal it for the present, for fear of his father, but promised to

reveal it in a fortnight to *Timswell*; took her immediately after this to lodgings, called her by his own name, had a piece of plate with both their arms engraved, a child born, and entered by *Hicks* himself, in the pocket book of the register of *St. Giles's* parish, as the child of *Robert* and *Mary Hicks*, and no proof of their cohabiting otherwise than as man and wife.

Therefore I ought to consider it as a marriage for the honour of the lady, though the gentleman has in a most dishonourable manner, upon his oath, denied the marriage: I am afraid interest had too large an influence on his answer; and as he appears to have had a very great sway over this unfortunate lady, or he could never have prevailed over her to bring a bill as feme sole, I will put it out of his power to touch any of her fortune, that he may not imbezil it to the prejudice of the child.

In consequence of my opinion the cross bill must be dismissed.

The first question upon the original cause is, what are the rights of the parties under the two wills.

As to the surplus of the father's personal estate, I must take it to be undisposed.

The rule of this court is, if there is any declaration that executors are but trustees, or if they have particular legacies, that the residue shall be considered as undisposed; there have been cases indeed where the wife alone has been appointed executrix, but two others are joined with her.

Where executors are declared to be only trustees, or have particular legacies given to them, the residue shall be considered as undisposed.

The consequence of this will be, that the children will be intitled to two parts, and the widow to one.

The next consideration is as to the legacy of 1000*l.* to *Mary Graydon*, under the will of the father.

Here is certainly a disposition over in case of a forfeiture, so that it stands distinct from those cases where there is no devise over.

Where the condition is become impossible, by the person dying, whose consent was necessary before the marriage, it is an excuse.

It is the constant rule of law in conditions subsequent, that if the performance becomes impossible by the act of God, it is absolutely void.

I am likewise of opinion that this is only a condition subsequent, to divest the legacy in case of a marriage before twenty-one; and it is the constant rule of law, in the case of conditions subsequent, that if the performance becomes impossible by the act of God, that it is absolutely void; for in *Co. Litt.* 206. it is laid down, that in case of a feoffment in fee, with a condition subsequent, that is impossible, the state of the feoffee is absolute, and therefore the daughter, according to this rule, is intitled to the 1000*l.* under the father's will.

Two questions arise under the will of the mother; first with regard to the specifick legacy to the daughter, and secondly, with regard to the surplus.

I am of opinion that the latter clause goes to the whole, and that the words *she shall not then be intitled to any part of such legacies as I have herein left her*, being spoken at the same time, there is no more a relation to what goes before, than to what follows, but is equally applicable to both.

The word executor in the mother's will is descriptive of every person who shall be administrator, being a power not annexed to his office, but independent from the rest of his duty.

But it has been objected, that this is not such a marriage as is a breach of the condition, because *John Graydon* the executor has renounced, and never took out administration, and therefore it has been granted only with the will annexed to *Mr. Timewell*.

Now I am of opinion the objection is not well grounded, for this is a description of every person, who shall be administrator, and that this was a power not annexed to the office of executor, but independent

independent from the rest of his duty as executor.

And therefore, upon the whole of this part of the case I declare, that this marriage is a forfeiture of the portion given under the will of the mother. *Graydon v. Hicks, and Graydon v. Graydon, 2 Atk. Rep. 16. pl. 16. Gr. & Rud. Law. & Eq. 199. pl. 4.*

A father by his will gives the plaintiff *Agnes* his daughter the sum of 2000*l.* payable at her age of twenty-one, or day of marriage, if she marries with the consent of his executors under his will; provided if either of the legatees die before their legacies become payable as aforesaid, then such legacy to be divided between the survivor of her brother and sisters.

The portion under the mother's will is forfeited.

A. gives 2000*l.* to *Agnes* his daughter payable at her age of 21, or marriage if she marries with the consent of his executors; provided if either of the legatees die before they become payable,

such legacy to be divided between the survivor of her brother and sisters. *Agnes* marries at fifteen without the consent of the executors. Mr. justice Parker held it to be a devise in *terrorem*, and that the legacy is vested, as marriage, one of the contingencies, has happened.

Agnes marries the plaintiff *Underwood* at her age of fifteen without the consent of the executors.

The question whether, as *Agnes* has married without the executors consent, this devise is not to be considered as a devise over, and that consequently the legacy will not vest unless she arrive at her age of twenty-one.

Mr. justice *Parker*. It is objected the time of payment is not come, because it is a marriage without consent of trustees, and that it must wait the event of *Agnes's* attaining her age of twenty-one.

But as this is a mere personal legacy, I am of opinion it is a devise in *terrorem* only, and that it vests absolutely in the daughter, and that marriage, one of the contingencies upon which it became payable, having happened, the executors must be decreed to pay it to the plaintiffs with interest at 4*l.* per cent. to be computed from the death of *Agnes's* father the testator. But the plaintiff

Underwood must first make a proper provision for *Agnes* before he is allowed to touch the money. *Underwood and Agnes his wife v. Morris*, 2 *Ask. Rep.* 184. pl. 158.

Whether a condition be precedent, or subsequent, if they are in restraint of marriage, the court have always put a favourable construction upon them to prevent a forfeiture. Where there is no objection to the person or estate of the gentleman who proposes, and the young lady herself is inclined to the match, trustees should consider themselves in the light of the parent, and readily come into a consent.

Mr. Smith had two daughters, the countess of *Clanrickard*, and lady *Desbouverie*; in 1714 he settled a house in *Ormond street*, and some leasehold estates in trust for lady *Clanrickard* for life, and to such person as she by writing should appoint; by his will *July* the 7th 1718. he gave a legacy to the plaintiff *Ann*, eldest daughter of lady *Clanrickard* of 1000 *l.* at twenty-one, or marriage, with interest at 4 *l. per Cent.* to *John* her brother 1000 *l.* at twenty-one; if one died, the whole to the survivor, and the residue of his real and personal estate to the trustees, in trust as to one moiety for the sole and separate use of lady *Clanrickard*, and by a codicil he directs that in case the plaintiff *Anne* should marry in the life-time of the countess, without her consent, that the plaintiff's legacy should be divided among the rest of lady *Clanrickard's* children; *Mr. De Golls* was the surviving trustee: the testator died, and the earl of *Clanrickard*. On the first of *August* 1732. lady *Clanrickard* makes an appointment of her house, and the leasehold estates to *Smith* earl of *Clanrickard* for life, and to his first and other sons in tail male, to daughters in tail general, remainder as to one moiety of the freehold to plaintiff *Anne* for life, and to her sons and daughters in tail male, remainder to lady *Mary Burke*; as to the other moiety in the same manner with cross remainders; and, by another deed poll of the same date, appoints *Mr. De Golls* to assign the real and personal estate devised by her father to the same trustees, *Sir Edward Desbouverie*, *John Manley*, and *Thomas Ward* and their heirs, in trust to sell and lay out in lands, and settle to the same uses as the freehold by the last deed, and till so invested, to be placed out to interest, and be applied for the benefit of

of the persons intitled to the rents and profits of the estate; in both deeds is the following proviso, that if her son the earl of *Clanrickard*, the plaintiff *Anne*, and lady *Mary Burk*, should marry without the consent of Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, or the major part of them, or the survivor of them, if any of them should be then living; that then he, she or they, marrying without such consent, and his or their issue or descendants, should forfeit or lose all his, her or their right to the premises; and the next person in remainder, pursuant to the appointment aforesaid, should and might in such case enter thereunto, and enjoy the same as if he, she, or they so marrying without consent as aforesaid, was or were actually dead without issue: by her will she confirms the deeds poll, and makes Sir *Edward Desbouverie*, *John Manley* and *Thomas Ward*, executors and residuary legatees on the same uses, and also guardians to her children: on the first of *January 1732*. the countess died, and on the ninth of *July 1734*. Mr. *De Golls*, pursuant to a decree in *Chancery*, assigned all the trust estates to Sir *Edward Desbouverie*.

In 1734. a treaty of marriage was proposed by and between the plaintiffs, and after it had been carried on about five months, the plaintiff *Daley* acquainted Sir *Edward Desbouverie* with his intentions: upon which Sir *Edward* took down in writing from *Daley's* mouth the following proposal for a settlement on the marriage: 4000 acres of land in *Ireland* worth 1200 *l. per Annum*. of which 600 *l. per Annum*, were proposed to be settled in present for their maintenance, the remaining 600 *l. per Annum*, in reversion after the father's death; in case she is a widow, and has issue 500 *l. per Annum*, in case she has no issue 600 *l. per Annum* jointure, her own fortune to be settled together with the 1200 *l. per Annum*.

Sir *Edward Desbouverie* communicated the proposal to *Manley* and *Ward* the next day, who did not approve of it, in regard Mr. *Daley*, the father of the plaintiff, was to have the interest of the plaintiff *Anne's* portion, which was about 800 *l.* for his life: The trustees agreed at that meeting not to consent, unless the plaintiff *Anne's* fortune was settled with the 600 *l.* a year for the present maintenance of the plaintiffs. On the twenty-ninth of May 1735 Mr. *Manley* at the request of the other trustees, transmitted the said proposal (which had been before delivered to the trustees in writing and signed by the plaintiff) to Mr. *Taylor*, by letter, who was guardian to the present earl of *Clanrickard*.

The letter in substance as follows:

We take the liberty to give you some further trouble in relation to lady *Anne*, who we find has an inclination to marry the son of Mr. *Dennis Daley*; the young gentleman has sent the inclosed proposals to Sir *Edward Desbouverie*; as we are intire strangers to Mr. *Daley*, we desire you may inquire into his circumstances, and how far he is able to make the settlement proposed by his son; and if his father should desire to treat, it is our opinion my lord's counsel should be consulted thereupon. Lady *Anne's* fortune at present is from her grandfather *Smith* about 3400 *l.* besides what was left by her father out of his *Irish* estate, which will make the whole, as we compute, upwards of 7000 *l.* and she has a further expectancy, in case of my lord's death, of a moiety of what my lady *Clanrickard* left my lord, if she marry with our consent; if not, she will lose it, and the whole will go to her sister, unless she should likewise marry without our consent; in which case the whole goes to Sir *Henry Parker*; this is all the influence we have over lady *Anne*, and she might with her fortune marry much better: yet if Mr. *Daley's* father will make the settlement proposed,

we

we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it. Lady *Anne*, very soon after her mother's death, went to her father's relations without our privity or consent, and how far they have perverted her we cannot tell, but she and the young gentleman both declare themselves protestants, and say that is the reason my lady's father's relations are against the match: We are your most humble servants, *John Manley, &c. London, the 29th of May 1735.*

Postscript; The above letter was prepared for all the trustees to sign, but Sir *Edward Desbouverie* going out of town in a hurry, desired I would forward it to you.

Mr. *Tayler*, in answer to this letter, on the eighteenth of *June*, sends the trustees the following proposal from Mr. *Daley* the father.

Four thousand acres of land to be settled to the use of *Dennis Daley, senior*, for life, remainder to *Dennis Daley, junior*, for life, with remainder to his first and every other son in tail; the said *Dennis Daley* hath agreed that he will lay out the portion at interest, or in the purchase of lands which shall be settled to the same uses, 600 *l. per Annum* present maintenance, 600 *l. per Annum* jointure, if no issue, but if issue 500 *l. per Annum*.

It appears by a letter from Sir *Edward Desbouverie* to Mr. *Tayler*, that all the trustees refuse to consent on any other terms than on lady *Anne's* portion with 600 *l. per Annum*, for their present support and her jointure; and the reason they give is, that if the father of *Daley* should have the interest of lady *Anne's* fortune, which at 6 *l. per Cent.* the common interest in *Ireland*, produces 540 *l. per Annum*, he in effect parts with nothing at present.

The plaintiff Mr. *Daley* applied several times afterwards to Mr. *Manley* for his consent, but he told the plaintiff he thought the terms insisted on by

by Sir Edward Debonverie and Ward, were reasonable, and that he never would give his consent on any other, and cautioned the plaintiff against the ill consequences of marrying without the consent of three trustees; and told him if he would consult counsel, and they should be of opinion what was insisted on by the trustees was unreasonable, he would be ready to submit, but not otherwise.

It appeared on evidence, that the plaintiffs were married by John Gaynam, the famous Fleet parson, on the 5th of June 1735.

The plaintiff Daley never applied to the trustees Manley and Ward for their consent, till he had been married some time.

The bill is brought to compel Mr. Daley the father to the specifick execution of the marriage agreement, or such other reasonable settlement as the court shall direct may be executed by him; that the trustees may join in the settlement, or sign their consent, so as to prevent a forfeiture, and that they may execute the trust in the two deeds poll.

The two material points for the defendants the trustees were, first, whether what the trustees have done amounted to a consent to a marriage of the plaintiffs.

Secondly if the trustees have done amiss in refusing their consent to the match.

On the 11th of December 1738. Lord Chancellor gave judgment,

That the marriage of the plaintiffs was substantially with the consent of the trustees.

First question, whether the condition annexed to the power is such a condition as lady Clanrickard could annex?

Secondly whether there is evidence sufficient on the part of the plaintiffs to shew, that their marrying was with the consent of the trustees?

As to the first, I think lady Clanrickard had a power to annex this condition.

As

As to the second, I think the condition has been well performed.

The proviso in both the deeds is very harsh and unreasonable, and therefore a court of equity will be justified in taking as great a latitude as may be in the construction of it, to prevent a breach: if the marriage was such as was fit, there could be no objection either to the person, or to the estate of the plaintiff Mr. Daley; neither was it a disparaging settlement: It appears through the whole cause that the lady had a strong inclination to the match, and therefore in such a case the trustees should have considered themselves in the light of a parent, and should have readily come into a consent.

It is manifest both from the letter and disposition of Mr. Manley one of the trustees, that he agreed to the proposal, and gave his consent that it should be a match; and the letter is likewise evidence that the trustees in general approved of the person, behaviour and quality of Mr. Daley; and it is also evidence of their consent to the marriage, provided Mr. Daley the father will make the settlement he proposed.

The words in the letter, *we shall be obliged to consent*, mean from the necessity of the thing, and for the happiness of the lady, and ought to be construed a present consent, that if the father would make the settlement, they would not break the match.

Trustees saying in a letter, we shall be obliged to consent, for the happiness of the lady, will be construed a present consent.

I have been considering of the evidence of the consent.

As to the conditions, whether precedent or subsequent, where they are in restraint of marriage, the court have always put the most favourable construction upon them, to prevent a forfeiture; and for this purpose *Farmer v. Compton*, Ch. Rep. 1. is a very strong case, and *Boslock & Iretton*, 2 Ch. Rep. 13. under the names of *Wiseman contra Foster*, before lord Nottingham, is a case in point.

The

The trustees have signified their consent, that a settlement should be made according to the prayer of the plaintiffs bill. And therefore I will decree accordingly. *Dennis Daley Esq; and lady Anne his wife, v. Sir Edward Desbouverie, and others, 2 Atk. Rep. 261. pl. 200.*

The words under the marriage settlement, such child as married without the father's consent should forfeit the said intended portion, extended to the whole interest each child might expect, under this settlement, whether certain or contingent.

A question arose on the marriage settlement of Sir John Wrottesley, who created a term for years, in trust, "to raise and pay, if one child only, 6000*l.* if two, 6000*l.* to be equally divided; if three, or more, 8000*l.* to be equally divided, and to be paid at their respective ages of twenty-one, or marriage; and it was provided, that if any of the said younger children should marry in the father's life-time, without his consent, and after his death without consent of the mother, such child should forfeit his or her said intended portion, to be distributed among the rest at the age of twenty-one, or marriage *with such consent*, or die before twenty-one, or marriage *with consent*; the portion to be divided among the survivors, at the age of twenty-one, or marriage *with consent*."

Frances, one of the daughters, married with Mr. *Bendish*, without the consent of the mother; and, on the hearing of the cause before lord Talbot, on the 6th of August 1734, it was held, that she had forfeited her portion by such marriage, and was decreed to the other children.

One of the daughters is since dead, before twenty-one, or marriage; and the petitioner, Mr. *Bendish*, who married *Frances*, applies now, in the right of his wife, who is twenty-one, for her distributive share of her sister's contingent portion.

The question is, whether *Frances*, as she has forfeited her original portion, is intitled to a share of this contingent portion, on the death of her sister before twenty-one, or marriage.

Mr. *Wilbraham*, for the petitioner, who was not twenty-one when she married, but arrived at

that age before her sister died, cited the case of *King v. Withers*, as a case in point.

Mr. Attorney general, counsel for the other sisters, insisted, that the whole term, and the whole 8000 *l.* was under consideration when the cause came before lord *Talbot*, and that he expressly declared *Frances* is not intitled to any share of the 8000 *l.* which must mean, that she had no interest at all, and could not possibly intend that she had a contingent interest.

If the intention of the parties to the settlement was plain, to give the portion over on marrying *without consent*, the court will not strain to construe it no forfeiture.

The whole tenor of the settlement is, that none of them should be intitled unless they had performed the conditions.

Mr. Solicitor general, in reply for the petitioner, said that the clause of forfeiture does not at all affect the contingency which has happened.

The said intended portion is the only thing which is to be forfeited, and can mean only what she is intitled to at the commencement of the term, nor are there any words whatsoever, that give over any share that might acerue afterwards, by the death of one of the daughters before twenty-one or marriage.

That *Frances* is intitled to this distributive share, because one of the contingencies has happened since her attaining the age of twenty-one, and she may yet marry a second husband with consent.

Lord chancellor: As this is the case of a forfeiture of a marriage portion, the court will make as favourable a construction as possible.

For, as Mr. Solicitor general said, if this had been *casus amissus*, the court would let it be where it is fallen, and not take it from *Frances*; at the same time I must make such a construction, as will suit the intention of the parties.

It has been objected by the defendant's counsel, that the petitioner is precluded from what is demanded by the petition, by lord Talbot's decree.

But this will not hold, because the terms of the decree are, that *Frances Bendish* having married *Higham Bendish*, after the death of Sir *John Wrottesley*, without the consent of lady *Wrottesley* her mother, is not intitled to any share of the 8000*l.*

The declaration of the court being in the present tense, cannot be extended so far as to exclude any thing she might be intitled to by a subsequent contingency, if within the terms of the trust.

The rather, because the rest of the daughters were not intitled at the time of the decree, being all under age, and therefore all were at liberty to apply to the court for further directions, and the application left open to Mrs. *Bendish*, as well as the rest.

But, however, the counsel are right as far as they have argued from the reason of the decree, which brings me to the construction upon the trust itself. Now as to this, it depends upon the frame and tenor of the whole trust.

There is one thing pretty extraordinary in the petitioner's demand, which is his claiming a gross sum of 2000*l.* the whole of her original portion, for 8000*l.* was all the provision under the settlement, if more than three children.

What is the effect of this? why, that notwithstanding she has forfeited her original portion, yet they will take back as much as the original portion they have forfeited, which would be a great absurdity, and therefore must be laid out of the case, for they cannot claim a fourth part of the original portion as it is given over: Therefore the question is reduced singly to a fourth part of the deceased daughter's fifth, and this must depend upon the clause of forfeiture.

First,

First, what is the meaning of *his* or *her* said intended portion. Now I do not think that the word *said* can be narrowed so far, as to relate only to the original portion; for the word portion or portions in this clause or declaration of trust does not mean the original portion only, but the whole interest which each child might expect under this settlement, whether certain or contingent.

If it rested singly upon the clause of forfeiture, I should be of opinion the petitioner is not intitled; but if you go on to the next clause it is still plainer.

Here it is not *in terrorem* only, but a legal determination of the term, and the court cannot set it up again.

Suppose the other three sisters had married under age and without consent, would not the term have determined; can it be insisted then, that the two sisters marrying with consent shall keep the term on foot for the petitioner's benefit, when the whole term would have ceased, if they had all married without consent.

As to the part of lord Talbot's decree, that gives Mrs. Bendish the sum which the father has left by his will to make up any deficiency in his childrens fortunes, I think it a very proper direction, and should have been of the same opinion, because it would be very hard to extend the words *make up* to a forfeiture if a daughter married without consent; it could not be so construed unless the father had repeated the words in the settlement marrying *without consent*. Upon the whole circumstances he dismissed the petition. *Wrottesley v. Wrottesley*, 2 Atk. Rep. 584. pl. 332.

The questions in this case arose upon the following will.

"*Rene Badouin*, by will dated the twenty-second of June 1727, did constitute his nephew *Gabriel Jabourdin*, and three others, executors; and, among several bequests, gave 1500 l. South-Sea

Where there is a condition annexed by a will to a devise of real or personal estate, and no

notice required to be given, unless the legatees perform the condition, they cannot be intitled, and where, there is a devise over, a forfeiture incurs.

Sea stock to his executors *in trust* to pay the yearly dividends and profits thereof to his brother *Claude Badduin*, during his natural life, and from and after his death, in trust to pay the said 1500*l.* South-Sea stock among the seven children of his nephew *Gabriel Jahourdin*, in the manner and proportion therein after directed and appointed concerning 7000*l.* South-Sea stock, by him herein after devised to and for the use and benefit of the said seven children of *Gabriel Jahourdin*, and did thereby also give to his said executors 7000*l.* South-Sea stock, in trust to transfer 1000*l.* to each of the seven children of his said nephew *Gabriel Jahourdin*, to wit, *Elizabeth, Gabriel, Mary, Rene, Dorothy, Peter, Cassandra*, at their respective ages of twenty-one years, or days of marriage, they marrying with the consent of the said *Gabriel Jahourdin* the father, or his executors, or the survivors or survivor of them, to be testified by their subscribing their names to the marriage articles, or settlement of the said children, or witnesses, or by being parties thereto, and executing the same: And in case any of the said children should die before twenty-one, or should marry without consent as aforesaid, then, and in such case, his will was, that the share or shares of the said 7000*l.* of such child or children, as should die, or marry without consent as aforesaid, should go and be transferred, share and share alike, to the other of the said seven children, at twenty-one, or marriage with consent as aforesaid, and did thereby direct, that his nephew *Gabriel Jahourdin* should receive and enjoy to his own use the yearly dividends and profits of the respective proportions of his said seven children, in the said 7000*l.* until their age of twenty-one, or marriage as aforesaid."

The testator died soon after; his brother is likewise dead, and *Gabriel Jahourdin*, the nephew of the testator, is dead; *Cassandra* married the defendant *Graydon*, July 25 1740, without consent; and *Peter* married the day after without consent; *Gabriel junior* arrived at his age of twenty-one, but died before

before the forfeitures were incurred by his sister *Cassandra's*, or his brother *Peter's* marriage, without consent.

The bill is brought by the persons who have married the other children of *Gabriel Fabourdin*, the elder, with consent, to be let in to their respective shares forfeited by *Cassandra* and *Peter*.

Mr. Solicitor general counsel for the plaintiff. One point made by the defendants, in their answer is, that the executors may still consent. But he said the case of *Fry v. Porter*, Vent. 199. was directly contrary, for at the time of the marriage only, the consent must be given, because then it must immediately go over to the other children if without consent; so that the executors upon consenting afterwards cannot bring a bill to take it from the other children.

Wrottesley v. Wrottesley June 1. 1743. vide ante, is almost in point; but besides, the executors do not say that they approve of it now.

From the moment of the childrens marrying with consent, or arrival at twenty-one, they are intitled to the capital, and then there is an end of the dividends; so that the produce of the stock in the father's hands cannot make a fund for the benefit of the children, as part of his personal estate; nor will the defendants be intitled to a share of this produce; for this was certainly given only in lieu of maintenance, and from the death of the father, the interest must follow the same fate with the capital.

Mr. Attorney general, counsel for *Peter Fabourdin*. The first marriage without consent was by *Cassandra*, the second was by *Peter*.

It is insisted by the plaintiffs, that *Cassandra* and *Peter* have forfeited their shares in the 1500*l.* and 7000*l.* South-Sea stock.

The question then is, whether *Peter* has forfeited or not? there is a fact which the gentlemen on the other side have industriously omitted; viz.

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that the executors did not give him any notice of the condition; and though it was determined in *Fry v. Porter*, not to be necessary, yet that was, because real estate was forfeited, and it is the law says there, it is not necessary, and therefore in that case, a person must bring himself within the terms: But I do not recollect it has ever been determined so, where personal estate has come in question; for then it is in the nature of a legacy, and must be governed by rules of the civil law: Where the whole rests in executors, they ought to give notice; for where there are legacies in a will, they are bound to pay them, though not demanded.

Mr. Brown on the same side: The words *manner* and *proportion* in the first clause may have another construction, than to extend in general to both clauses, and if it can be construed to any other sense, the court will incline to it, as forfeitures are not favoured, and that the testator did not intend to involve the 1500 *l.* with the 7000 *l.*

He argued that *Gabriel Jabourdin's*, though it was a contingent interest in these forfeitures, yet was transmissible to his representatives, as he lived to be twenty-one; for a possibility is assignable in equity, and the defendants in that light are intitled: for there is no case that makes it necessary for the person, who has a contingent interest, to be living, when it takes place. *Vide King v. Withers*, Cases in lord Talbot's time 117. *Corbet v. Palmer*, 26 Feb. 1734. and *Pinbury v. Elkin*, P. Wil. 563.

Did thereby also give to his executors 7000 *l.* South-Sea stock, in trust to transfer 1000 *l.* South-Sea stock to each of the seven children at their respective ages of twenty-one years, or days of marriage, they marrying with the consent of, &c.

As this is given payable at a future time, these two different periods must be considered separately, and relate only to the transfer either at twenty-

one, if that happen first, or on the day of marriage, if that happen first, and though there is a marriage, *without consent*, yet it is payable at twenty-one afterwards, if they live to arrive at that age.

Mr. Chute for Mrs. Cassandra Graydon: This is a mere legacy, and not given by way of portion, for the testator was not obliged by a debt of nature to provide for them: And therefore ought to be governed by the rules of the civil law, which discourages forfeitures, especially with regard to the 1500*l.* to which there is no forfeiture annexed.

Mr. Solicitor general in reply said, that the words *manner* and *proportion* have two different constructions, the word *proportion* relates to the shares both in the 1500*l.* and 7000*l.* and the word *manner* relates to the time when it becomes payable, *viz.* the arriving at twenty-one, and the marriage *with consent*, according to the rule that *verba relata inesse videntur*.

As to what has been insisted on with relation to Gabriel, junior, that a share in the fortunes forfeited by Peter and Cassandra vested in his representatives; it is impossible it could take place; for Cassandra and Peter both married before twenty-one without consent, and on such marriage it is given over immediately, so that their fortunes were forfeited before the time of vesting came, and are therefore absolutely gone.

Lord Chancellor. Several questions have been made at the bar.

First whether there is any forfeiture at all.

Secondly what will be the extent of it.

Thirdly, what shares the parties claiming under the forfeiture are to take.

Now as to the first, it is extremely plain there is a forfeiture incurred by a marriage *without consent*, or otherwise this case would not be consistent with the rest of the cases on this head. The only excuse attempted to be made, is, that the

defendants had no notice of *the condition* in the will of *Badouin*. I shall lay this out of the case; for where there is a condition annexed by a will to a devise of real or personal estate, and no notice required to be given, nor any person obliged to give notice, there the legatees must perform the condition, or cannot be intitled; and if they do not, where there is a devise over, a forfeiture incurs. Nor in the reason of the thing, do I see any difference at all between real and personal estate: And therefore where no body is bound to give notice, the parties must themselves take notice. It is said *the executors* should have given notice, but the testator has laid no such obligation upon them, neither do the executors take any beneficial interest, whether the condition be performed or broken.

The second question is, what will be the extent of the forfeiture? whether the forfeitures are confined only to the 7000*l.* or by relation extend to the 1500*l.* likewise. This is not quite so clear, but I am however of opinion that the forfeiture extends to both: nor can I make any other construction, without contradicting the testator's own intention, and making the court contradict themselves. For the testator's putting the two sums in different clauses, was on account of the gift of the produce of the 1500*l.* stock to his brother during his life, or otherwise he would have thrown the whole into one clause. The original proportion would have been a division into sevenths, but is different when one or two or more of the devisees marry *without consent*, and therefore the proportions arise, and are to be regulated by the several contingencies as they happen.

The word *manner*, as has been rightly argued, takes in every thing.

To one for life,
and to B. on cer-
tain conditions
and restrictions,
and to C. in
forma prædicta,

Suppose an estate be limited to one for life, and to B. on certain conditions and restrictions, and to C. in *forma prædicta*, this will take in every condition

condition and restriction in the preceding limitation to B. this expression may be found in conveyances even to this day, but very commonly in admittances to copyholds.

will take in every condition and restriction in the preceding limitation to B.

The third question will be, what are the shares and proportions the several parties claiming under this forfeiture are to take?

Mrs. Cassandra Graydon was married on the 25th of July, and Peter the next day.

It is insisted by Peter's counsel, that he is intitled to a share in Cassandra's forfeiture. It would be very extraordinary that Peter by marrying without consent should forfeit his own fortune, yet take advantage of the very same offence in his sister which he had committed himself.

See the clause in the will, beginning with, and in case any of the said children should die, the share or shares, &c.

What is the meaning of the words *share or shares*? why the whole that the children shall be intitled to, as well the original as the contingent portions shall go and be transferred, &c. and this brings it to the case of Mr. Bondys in *Wrottesley v. Wrottesley*, where I determined in the same manner on the word *Portion*, which is not at all more general than the word *share* in the present case. "And did thereby also give to his said executors, &c. in trust to transfer, &c. to be at their respective ages of twenty-one years, or days of marriage, *they marrying with the consent, &c.*"

It is said this is a condition not annexed to the age of twenty-one, but confined to the day of marriage only. But if they marry without consent before twenty-one the condition is broke; and it was the intention of the testator, that there should be no new time which should arise, but the legacy to be absolutely gone. Therefore, this making a forfeiture of the whole avoids the absurd construction, that they may take advantage of the breach of condition which they have been guilty of themselves.

Whereas either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet if real, his heir, if personal, his executor will be intitled.

As to the point relating to *Gabriel*, I am of opinion, as he attained his age of twenty-one that it vested in him notwithstanding he died before the contingency of his brother and sister's marrying without consent happened, and therefore his representative is equally intitled to a share of the forfeiture with the other children, as that fact has taken place, and the dying before makes no difference, for where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life-time of the first devisee, yet if real, *his heir*, if personal, *his executor* will be intitled to it; for though in law a possibility is not assignable, yet in equity where it is done for a valuable consideration, it has been held to be assignable, and transmissible to the representative of devisee. *Vide Higden v. Williamson*, 3 P. Wil. 132.

Lord chancellor declared *Chauncy and his wife* were intitled to one fifth part of the portions so forfeited, *Western and his wife* to another fifth, *Small and his wife* to another fifth, and one of the defendants the executor of *Gabriel* the younger, to another fifth.

The share of *Gabriel* under the will, his lordship said, must be divided into six shares, and the forfeiting children must take equally in this with the others. *Chauncy and others v. Graydon and others*. 2 Atk. Rep. 616. pl. 343.

Cambel devised 6000 l. to his granddaughter *Catherine Burton*, to be paid on the day of her marriage with interest from the testator's death, in case she married with the consent of *Samuel Burton* Esq; her father; but if she married without such consent, or died before marriage, then the testator limited this 6000 l. to all the children of his the testator's brothers and sisters, to be equally divided amongst them; then the testator died, and the said *Catherine* being then about nineteen years old, the father, by friends, moved a match for her with
lord

lord *Netterville*; but after, *Burton* weighing his own circumstances, and his inability to make good the proposals by his friends made to lord *Netterville*, entered into schemes to accomplish the match without entering into strict settlement or agreement; and to that end gave the lord and lady frequent opportunities of coming together, and at length finding their affections engaged, went one day out in his chariot on purpose, as was proved in the cause, to give the young couple an opportunity of being privately married, which accordingly took effect the last of *February* 1731. After *Burton* taking advantage of the marriage being thus had, and under pretence that the lord and lady had not obtained his consent, prevailed upon his lordship in full form to make a considerable settlement on his lady by her late maiden name, and to be married again with full appearance of his the said *Burton's* consent, as being party to the said settlement, and consenting to the said marriage; but the parties to whom the 6000*l.* was given over brought their bill, insisting the marriage in *February* 1731, was without *Burton's* consent. But it was decreed by the lord chancellor in *Ireland*, that the lord and lady *Netterville* were well intitled to the said fortune, to be applied as by the articles was agreed. And on appeal the decree was affirmed by the lords here. *April* 1737. *Rud. Law & Eq.* 198. pl. 21.

*I leave and bequeath to my daughter Anne 2000*l.* to be paid her on the day of marriage, or at the age of twenty-one years, which should first happen; and in case my said daughter Anne shall marry with the consent and approbation of Robert Oliver, Esq; Berkley Taylor, Esq; John Croker, Esq; and my said son John, or any two of them; I further leave and bequeath to my said daughter Anne, the additional sum of 2000*l.* more, OTHERWISE NOT. Anne coming of age, writ to Oliver to know what fortune she was intitled unto, who sent her counsel's opinion, that*

she was intitled to the additional 2000 l. whether she should marry with or without consent; *the same not being given over.* After her brother John, disliking the match he saw her carrying forward, declared such dislike to her, and warned her, that if she proceeded in it, she would forfeit the additional 2000 l. and their referring themselves to another counsel, who was a relation of the family, he was in opinion with the brother; however the lady thought proper to proceed in this amour, and so the marriage took place. And on a bill by the husband and wife, the court of Exchequer in Ireland decreed it a forfeiture, *Holmes et ux v. Lysaght* and 24 May 1733, an appeal was to the lords here, but it ended by compromise. Had 4000 l. been given to her, but on condition if she married with, *not* such consent, that then 2000 l. of it should be gone and lost to her; in such case, it not being given over, on her having solicited the consent necessary, though she had not obtained it, as I take it, the first opinion had been right; as it was not in such case given over; but the present case is plainly of a condition precedent, to be performed on her part; she was first to marry, and that with such consent, to make her title to the additional 2000 l. and those were the terms on which she was to marry, AND NOT OTHERWISE. Had she never married, this additional sum could never have been raised; and her marrying, but that without consent, was falling principally short of the terms annexed; and that too in the very point aimed against, and so makes a total breach of that condition. Rud. Law & Eq. 198. pl. 3.

Where a tacit
consent is
sufficient.

The testatrix devised 300 l. to B. her daughter, but if she married under twenty-one without the consent of the executors, or the major part of them, the legacy to go to the children of her sister, the wife of C. and made C. and two others executors. B. being at the house of C. married his son by a former wife, with his privy, being under twenty-one. B. and her husband bring

bring a bill for the legacy; C. in favour of his other children insists that the legacy; is forfeited; the other executors confessed they had notice of the courtship, but did not contradict or disapprove of it. It was held, that the plaintiffs should have the 300*l.* there being at least a tacit consent, *Mesgret and Mesgret, 2 Vern. 586.*

Of void Devises of Land, by devising what the Law itself, or what the Policy of the Law, will not admit.

IF a man devise land in fee to his heir at law, this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title by taking away the entry of such as may possibly have a right to the estate, whereas if he only claims by the devise, he is in by purchase. *Rol. Ab. 626. Hob. 30. Plowd. 345. Godd. 461.* So if a man devise land to his wife for life, remainder to *J. S.* who is his heir at law in fee, this is a void devise to *J. S.* because after the disposition of the particular estate, the reversion would have gone without any further disposition, in the same manner as it is limited by the will. *2 Leon. 191. Rol. Ab. 626. Hob. 30.* A. seised in fee of lands *ex parte materna*, devised them to his executors for sixteen years for payment of his debts, and after devises them to his heir at law *ex parte materna*; this is a void devise to the heir at law; though it was urged, to support the devise, that if it obtained, the heir *ex parte paterna* might in the end inherit, which he could never do if the devise was rejected; yet the court adjudged the devise void, because this is no alteration made in the tenure of the estate, nor is the quality thereof any ways altered; but where the devisee takes by the will or by descent, it is a fee-simple, and it would be but *actum agere* to

On a devise in fee to the heir, he shall take by descent, and not by the will.

to make him take by the will. *Hedges and Row,*
3 *Lev.* 127. 2 *D. A.* 558. p. 15.

Aliter if another
estate is created
by the will than
would have de-
scended, or the
quality of the
estate is altered.

But where another estate is created by the will than would have descended to the heir at law, or where the quality of the estate is altered by the devise, there the disposition of the will shall prevail, though it be made to the heir at law. *Moor* 680. *Godol.* 461. 1 *Rol. Ab.* 610. *Hob.* 30. As where a man hath a son and a daughter, and devised that his land shall descend to his son, and if he died without issue of his body, remainder over; the son by this devise takes an estate-tail, though heir at law to the devisor, because here is an estate-tail created by the will, and the heir must take under the will, or the remainder would be void. *Hob.* 30. 1 *Rol. Ab.* 610. A man had issue only three daughters, and devised his land to them and their heirs; this devise, though to the heirs at law, is good, because it makes them joint-tenants, in which survivorship takes place; whereas, had they taken by descent, they had been co-parceners, and the will altering the quality of the estate ought to prevail. 3 *Lev.* 128.

A devise to a man
in fee, and if he
die without heirs,
remainder over,
the remainder
over is void as
tending to a per-
petuity.

If a man devises land to *A.* in fee, and if he dies without heirs, then *B.* shall have it, the last devise is void, for a fee cannot depend upon a fee; for no man can say when the heirs of *A.* will fail; and to allow of the remainder to *B.* upon such a distant contingency, is to perpetuate the estate in the family of *A.* and yet preserve a remainder or interest in *B.* which very possibly may never vest; and as these estates are unalienable, though all mankind should join in the sale, the reason and policy of the law will not admit of a longer contingency, than for a life or lives *in esse*, wearing out together, or the term of twenty or thirty years. *Dier* 41. *a. Brook* 234. *Co.* 85. *b. Bull.* 195. *Plowd.* 29. 2 *Leon.* 69. *Inst.* 18. *b. Poph.* 34. 2 *Rol. Rep.* 220. *Godol.* 355. *Cro. Eliz.* 205. *Rol. Ab.* 626. *Dier* 124.

A. devised to the drapers company and their successors, upon trust, to convey to B. for life, and to his first son, and all other his sons for life; and to their issue male for life; and for want of such issue, to J. S. for life, and to his issue male for life, &c. and so to a great number of them for life, and to convey *toties quoties*. The court held this attempt to make a perpetual succession of estates for life to be vain and impracticable; however that there ought to be a strict settlement made, and the intent of the testator followed as far as the rules of law would admit of; and therefore directed a settlement to be made so, that such who were in being should be only tenants for life; but where the limitation was to a son not in being, there he must be made tenant in tail. *Hummerston and Hummerston, 2 Vern. 737. Wil. Rep. 332. Rep. Eq. 128, 207. Pro. Ch. 455. Gilb. Rep. 128. 2 Eq. Cas. Abr. 457. pl. 1.*

Devise to a corporation in trust to convey to the testator's issue for life toties quoties, in such manner as to create a perpetual succession for life, void

Of void Devises of Lands by the Incertainty of the Thing devised.

DEVISES are void and rejected where the words of the will are so general and ineertain, that the testator's meaning cannot be collected from them; according to that rule, as the heir at law has a plain and uncontroverted title, unless the ancestor disinherits him, it would be unreasonable to set him aside, unless the intent of the ancestor is evident from the will; for that would be to set up and prefer a dark, or at least a doubtful title, to a clear and certain one: But as it is likewise a rule in the construction of wills not to reject any words in a will which can have a signification, these two have been the occasion of several doubts and resolutions concerning the intention of the testator about the disposition of his estate, whether he meant his real or personal, or what part of either of them he intends to pass by the words of his will.

Of void devises of lands by the incertainty of the thing devised

I give all to my
mother, lands
pass not.

2d. on the 1st. of the
will, the lands pass.

2d. on the 1st. of the
will, the lands pass.

2d. on the 1st. of the
will, the lands pass.

Where by a de-
vise of all my
lands and tene-
ments, a lease
for years will
not pass.

Where a house
shall not pass
with the lands.

Where the lands
in one vill only,
shall pass, though
he devises all his
lands.

A man, seised of lands in a borough where lands were by custom deviseable by parol, devises in these words, *I give all to my mother, all to my mother*; It was held, that the lands passed not; for the words were too uncertain, and not sufficient to disinherit an heir. *Bowman and Milbank, Lev. 130. 2 D. A. 527. p. 16.*

If a man hath lands in fee-simple, and lands for years, and he devises all his lands and tenements, the fee-simple lands pass, and not the lease for years; but if a man hath a lease for years and no freehold lands, then by a devise of all his lands and tenements the lease for years will pass. *Ross and Barlet, Cro. Car. 292. Godol. 237, 352. 2 D. A. 527. p. 13. 3 D. A. 364. p. 6.*

A man seised of a messuage in *A.* and of a messuage and several lands in *B.* devised to *J. S.* his house in *A.* with all other his lands, meadows, and pastures, with all and singular their appurtenances whatsoever in *B.* It was held that the house in *B.* did not pass; for though by the feoffment or lease of lands in *D.* Houses will pass, because to be taken most strongly against the feoffor, &c. and the land passing, the house thereupon must also, pass, yet wills are to be taken according to the intention of the devisor, and when he devises his house in *A.* and lands in *B.* it cannot be presumed that he would have more pass than by the words is expressed. *2 And. 123.*

If a man is seised of lands in a vill, and in *A.* and *B.* two hamlets in the same vill, and devises all his lands in the vill, and in *A.* no part of the land in *B.* shall pass; for his naming one hamlet only, fully shews his intent that the lands in the other should not pass. *Dier 261.*

A man having two several moieties of lands by purchase of the same person, one lying in *Kent* and the other in *Essex*, devised all his moieties in *Kent*; and it was held that both passed; for the words being, *all his moieties*, they cannot be satisfied with

with one moiety only. *Mirrel and Nichols, Bulst.* 117. 2 *Bulst.* 176. 2 *D. A.* 525. p. 5.

A. seised of lands called *Haylands*, extending into two towns *C.* and *D.* devised all his lands in *C.* called *Haylands* to *J.* his younger son and his heirs; and after, in another part of his will he willeth, that if his son *J.* die without issue, that his wife shall have *Haylands*, and died; *J.* died without issue: Resolved, that the wife should have only that which was in *C.* because there was no more devised to the younger son. *Wooden and Osborn, Cro. Eliz.* 674. 3 *Leo.* 77. 2 *D. A.* 525. p. 9. *Mes per Popham*, it might have been otherwise if the devise had been to the elder son, and if he died without issue, to the wife, for he would have the whole; that in *C.* by devise, and that in *D.* by descent.

A man seised in fee of two houses in *D.* the one adjoining to the other; the one in the possession of *A.* and the other, being a corner-house, in the possession of *B.* he devises his corner-house in the possession of *A.* and *B.* by these words, only the corner-house which is in the possession of *B.* shall pass, and not the adjoining house, which is in the possession of *A.* *Rel. Ab.* 613, 614.

Where there is a wrong description of the tenant in possession.

A man died seised of lands in *A.* *B.* and *C.* lands in *C.* being in him by mortgage forfeited, he devised the lands in *A.* and *B.* to several persons and their heirs, and then adds this clause, viz: *All the rest of my goods, chattels, leases, estates mortgages, debts, and other goods whatsoever, I devise to my wife, after my debts and legacies paid, and made his wife executrix.* The wife entered into the mortgaged lands, devised them to *M.* in fee, and died. Resolved, that by the words of the devise to the wife of *all my estate, mortgages, &c.* an estate for life only passed unto her; but it was agreed, that if he had devised all his estate in such land, or had mentioned that he had such lands mortgaged in fee, and devised this mortgage, the fee had passed

Where there is a wrong description of the tenant in possession.

passed. *Wilkinson and Merryland, Cro. Car. 447, 449. Jones 308. 2 Rol. Ab. 700. p. 15. 3 D. A. 176. p. 14, 15, 16. Vide Styl. 261.*

A. sold lands to B. but before a conveyance was executed, B. sold the same lands to C. and then A. conveyed to C. and C. being thus seised devised the lands to his younger son by these words, I bequeath to R. my son all my land which I purchased of B. whereas in strictness of law he purchased them from A. who conveyed them to him; yet this was allowed to be a sufficient description of the land, and consequently a good devise of it, because the purchase was made from B. the money being paid to him. Thorp and Thompson, 2 Leon. 120.

A. being seised of a house called the White Swan in Old Street, London, and of a garden thereunto belonging, devised as follows: I devise the house or tenement wherein W. N. dwelleth, called the White Swan in Old-Street, to J. D. for ever. W. N. at the time of the devisor's death inhabited the entry of the said house, and three upper rooms therein, and J. G. held the garden and other places in the house, and some others other rooms. Resolved that all the house passed to the devisee; for the devise being, that house or tenement, and the conclusion being called the White Swan, both of them import the whole house; and the words, wherein W. N. dwelleth, do not abridge or alter that devise; and the house being named by a particular name, although W. N. never dwelt in it, it passeth by the devise. Chamberlain and Turner, Cro. Car. 129, 200. Jon. 195. 2 D. A. 526. p. 12. 3 D. A. 175. p. 6.

What passes by
a devise of land
cum pertinentiis.

A. seised of a messuage and two acres of land in N. and of two acres of meadow in K. used and occupied the said two acres in K. with his lands in N. and in his will devised the messuage cum omnibus & singulis pertinentiis adinde vel aliquo modo spectantibus to K. filio suo & hæredibus suis in perpetuum, and for want of such issue to E. his daughter

daughter for ever. Resolved, that by the devise *cum pertinentiis*, the two acres of meadow did not pass; but otherwise it had been, if the devise had been *cum terris pertinentibus*, for then that which was used with it would have passed. *Hern and Allen, Cro. Car. 57. Hutt. 85. 2 D. A. 526.*

p. 11.

A. devised divers legacies in money; then he devised lands, and after that he devised as follows: *All the rest and residue of my money, goods and chattels, and other estate whatsoever, I give to J. S. whom I make my executor.* The testator having other lands, it was decreed by the lord keeper that the other lands, did pass. *Tirrel and Page, Ch. Ca. 262.*

A man seised in fee of three tenements, possessed of a lease for years, and divers goods and chattels, devised one tenement to one of his sons, another tenement to one of his daughters; and then adds, *Item, I make my two sons executors of all my goods moveable and immoveable, and all my lands, debts, duties and demands.* It was held that by this clause no estate in the three tenements, of which the devisor was seised in fee, passed to the executors by force of the words, *and all my lands*, because the lease for years might well satisfy these words. *Rol. Abr. 613.*

Making a person executor of all his goods, lands, &c. passes not the lands.

A man, who had a real and personal estate, but no lease for years of any lands, devised in this manner, *I make my niece executrix of all my goods, lands and chattels.* The lord chancellor held, that the real estate did not pass by these words; and that the word *lands* was not useless, and to be rejected, for that in all probability there might be rents in arrear of those lands which would pass to the niece by her being made executrix. *Piggott and Penrice, Rep. Eq. 137. Prec. Chanc. 471.*

A. devised certain lands to his youngest son in fee, and then goes on thus: *Item, I devise all my lands in D. to my wife for life: Item I devise the lands, which I hold of G. T. to my wife for life:*

Where the reversion of lands shall pass.

Item,

Item, I devise the lands, which I purchased of *J. S.* to my wife for life: *Item* I devise my said lands to my son *Edward Gameach* and his heirs for ever. It was held, that not only the reversion of the lands purchased of *J. S.* but of the lands in *D.* and of the lands held of *G. T.* passed to *Edward* by these words. *Barrow and Gameach, Skin. 130.*

A. being seised of the manor of *B.* and of other lands in the county of *S.* devised the manor of *B.* for six years, and part of the other lands to *J. S.* in fee; and then devised the rest of his lands in the county of *S.* or elsewhere, to his brother, &c. By this devise the reversion of the manor passed, *Allen 28.*

A. devised several houses to a charitable use, and devised a mesuage to *J. S.* for life; and by another clause devised to his wife, the better to enable her to pay his legacies, all his mesuages, lands, tenements and hereditaments, not above disposed of. It was held that this passed the reversion of the said mesuage, though it appeared that the wife had sufficient to pay the legacies. *Mich. 1 W. & M. Willows and Lydcot, 1 Vent. 285. Carth. 50. 3 Mod. 229. Lev. 212.*

J. S. devised *Black-Acre* to *A.* for life, and devised to *B.* all his lands not before devised, to be sold, and the money to be divided between his younger children. It was held, that the reversion of *Black-Acre* passed by these words. *Rooke and Rooke, 2 Vern. 461. Prec. Ch. 202.*

A. by virtue of several settlements, being tenant in tail, after possibility of issue extinct, of some lands, remainder in fee to trustees, in trust for him and his heirs; and as to some other lands, being tenant for life, remainder to his first and other sons; remainder to trustees in fee, in trust for the right heirs of *B.* whose heir *A.* was; and as to other lands, being tenant in tail, remainder to the right heirs of his father, whose heir he likewise was; and

and being likewise seised in fee of a very considerable real estate of his own purchase, and possessed of a very large personal estate, devised some part of his lands to his wife for life, and gave several legacies; and having no issue, devised all other his lands, tenements and hereditaments, *out of settlement*, to his nephew, provided he took on him his surname, subject to raise 4000 l. in case the testator left a daughter. It was held, that all the estates thus settled passed by the will, notwithstanding the words, *out of the settlement*; for the word *hereditament* comprehends a remainder or reversion, as well as an estate in possession. *Mich. 1708. Strode and Russel, 2 Vern. 621. 3 Ch. Rep. 169.*

A. being seised in fee of lands in *D.* upon the marriage of his eldest son settled those lands upon him intail male, remainder to his own right heirs; and being seised in fee, in possession of other lands in *L. M.* and *N.* devised all his messuages, lands, tenements and hereditaments in *L. M.* and *N.* *or elsewhere*, not by him formerly settled, for the payment of his debts, and after debts paid, then to *J. S.* his second son in fee; soon after the testator's death, the eldest son died without issue, and without having barred the remainder, but left several daughters. It was held, that the word *elsewhere* was a sufficient description of the lands in *D.* tho' of greater value than those in *L. M.* and *N.* and that though it was of itself a significant and expressive term, yet it was the rather so in this case, because there were no lands or out-skirts not particularly enumerated, to which it could be applied, but those in *D.* that the words messuages, lands, tenements and hereditaments, were sufficient to pass the reversion of the lands in *D.* notwithstanding the exception, or restrictive words, *not formerly settled.* *Trin. 1730. Chester and Chester, Fitz-Gib. 150. See 3 Wil. Rep. 56. pl. 15. Mosely 313, 337. 2 Eq. Cas. Abr. 330. pl. 9.*

M

A. devised

Testaments, Last Wills, and Executors.

A. devised to *B.* lands in *D. S.* and *T.* and all his lands *elsewhere*, and charged them with a rent-charge of 80*l.* *per Annum.* *A.* had lands in mortgage that did not lie in *D. S.* or *T.* which were of much greater value than the lands in *D. S.* and *T.* He had also some small parcels of lands which were not specified, which were of the same of those devised. It was held, that the word *elsewhere* was applicable to the last mentioned lands, but not to the mortgaged lands, and that they would not pass by the will; for the testator could not be thought to mean lands of so much value under the word *elsewhere*, which is like an *Et cætera*, that comes *currente calamo*; neither could he intend that the rent-charge should issue out of lands that were every day redeemable. *Sir Thomas Littleton's case, Vern. 3. 2 Vent. 351. 2 Ch. Ca. 52.*

By a general devise of all lands, tenements and hereditaments, mortgages in fee, though forfeited, will not pass, nor will they pass by such a general devise, though the equity of redemption be, after the making the will, foreclosed or released. *2 Vern. 623.*

A man having settled all his estate of inheritance upon his wife for life, for her jointure, makes his will, and after having given several pecuniary legacies, says, All the rest and residue of my estate, chattels real and personal, I give and devise to my wife, whom I make sole executrix. It was held, that the reversion of the jointure-lands did not pass by this devise to the wife, the precedent and subsequent words explain the testator's Intent to carry only his personal estate; for in the first part of his will having given only legacies and no lands, the words *All the rest and residue* are relative, and must relate to an estate of the same nature of that he had before devised, which was only personal; for having given no real estate, there could be no rest and residue of that to be disposed of. *Hil. 1712. Marchant and Twisden, Rep. in Eq. 30.*

Of Devises void by Incertainty in the Description of the Person who is to take.

A Devise of lands to the eldest son of J. S. is good; or to his second or youngest son. So is a devise to the wife of J. S. or though she be called *Em.* for *Emlyn*, or to *Robert* earl of, &c. tho' his name be *Henry*. 1 *Inst.* 3. A devise to a stock, family or house, is good, and shall be intended of the heir. *Hob.* 33. A devise to the eldest son of J. S. by the name of *William*, when his name in fact is *Andrew*, is good. *Nelf. Cha. Rep.* 403.

Of devises void by the incertainty of the description of the person to take.

If a man has two sons named J. and devises to his son J. all his lands, this is void for the incertainty, unless it can be proved that the testator meant one of them in particular, by the elder son's being beyond sea, probably dead, &c. for these circumstances clear up the intent of the testator; and such averment is admitted, because it is consistent with the will; and the construction, and judgment thereon, must be genuine, because taken from the words of the will. 5 *Co.* 68. b.

Where parol evidence shall be admitted to explain the intent of the testator.

A man having issue two sons and two daughters, devised his land to his wife for life, and that after her death the same should remain to his issue. This devise, as to the remainder, was held to be void; for the devisor having several children, it is uncertain what issue he intended. *Taylor and Sayer, Cro. Eliz.* 742. 2 *And.* 134. p. 81. *Godb.* 302. 2 *D. A.* 514. p. 2. 3 *D. A.* 182. p. 19. *Sed vide Raym.* 83. this case cited and denied to be law, and 3 *Lev.* 433. and 6 *Co.* 17. *contra.*

A man having issue eight daughters by three venters and one son, devised his land to the youngest daughter, remainder to his son in tail, remainder to the two daughters by the middle venter for life, remainder *proximo de sanguine* of the devisor,

and dies; and after the eldest daughter has issue, and dies; the son and all the daughters, except the two daughters by the middle venter to whom it was given for life, die without issue; the issue of the eldest daughter shall have it. *Palm.* 303. *vide Stiles* 240.

The testator devised all his lands to one of his cousin *Nicholas Amburst's* daughters, that should marry a *Norton* within fifteen years, and died; *Nicholas Amburst* had three daughters, and one of them married a *Norton* within the fifteen years. This was a good devise to her, notwithstanding the incertainty. *Bate and Amburst, Raym.* 82. 2 *D. A.* 515. p. 6.

The testator devised lands in trust for *A.* and the heirs of his body, remainder to *B.* for life; and further wills, that if *A.* die without issue, and *B.* be then deceased, then, and not otherwise, he gives the lands to *J. N.* and his heirs; though *A.* dies without issue in the life-time of *B.* yet after the death of *B.* *J. N.* shall take; for the words, *If B. be then deceased*, expresses the testator's meaning, that *B.* should be sure to have it for life, and also shew when *J. N.* shall take. 2 *Vent.* 363.

A devise of lands to trustees in fee, in trust to pay debts and legacies, and after debts and legacies paid, to sell, and if any of the deviser's name would buy it, such person to have it for 200 *l.* less than the value; one of the testator's name brings a bill for the benefit of this pre-emption five and twenty years after the testator's death; the bill was dismissed. *Lord Chancellor*: If two of the testator's name should claim the benefit of this devise who must have it? *Huckstep and Matthews, Vern.* 362.

A man devised lands to trustees, in trust for his daughter for life, remainder to the second son of her body in tail male, remainder to her other sons in like manner, remainder to her eldest daughter, and to the first son of her body, taking upon him the

the name and arms of the devisor; and adds further, that he did not devise the estate to her eldest son, because he expected his daughter would marry so prudently, as that the eldest son would be provided for; the daughter married, and had issue a son, who died within twelve months after his birth; after his death she had another son. It was adjudged, that this second son should take according to the words of the will, though contrary to the intention of the testator. *Trafford and Ashton*, 2 Vern. 660. See *Wil. Rep.* 415. pl. 116. 2 Eq. Cas. abr. 641. pl. 8.

A. B. and C. were aliens and brothers. *A.* had issue a son, *B.* and *C.* were naturalized, *B.* purchased lands, and devised them to the heir of his brother *A.* and his heirs; *B.* dies, living *A.* and his son; the devise is void for the uncertainty who is to take thereby; for *A.* being an alien can have no heir, or however being alive, can have none during his life. But *per Glyn*, chief justice: Had it been found that the son of *A.* was the reputed heir of *A.* though *A.* was an alien, yet his son might have taken by this devise. *Trin.* 1656. *Foster and Ramsey.* 2 Sid. 23, 51, 148. *Vaugh.* 274. *Vent.* 413. 2 *Keb.* 601. 2 *Jon.* 10. 2 *Vent.* 1. *Sid.* 193. *Cart.* 185. *Lev.* 59. *Keb.* 65, 174, 216, 265, 535, 579, 585, 603, 670, 699, 850. 3 *Lev.* 412. 1 *D. A.* 323. *D.* p. 1. 2 *D. A.* 514. p. 5. 554. p. 10.

A man had issue a son and a daughter, who had issue two daughters; the father devised that all his land should descend to his son, provided, that if my son should die without issue of his body, then my land to go to my right heirs male of my name and posterity for ever; the son died without issue, the brother of the devisor brought an ejectment. It was held, that this devise was void, because neither the brother nor the daughter could claim under the description of the will; the brother could not, because, though he was of the testator's

name, he was not his heir; the daughter could not, because, though she was the testator's heir, yet she was not of his name, and so not within the words of the will, and consequently the limitation was void for uncertainty. *Counden and Clerk, Hob. 29, 30. Moor 860. Brownl. 129. Jenk. 294. W. Ent. 445. 2 D. A. 556. p. 1. 3 D. A. 189. p. 6. 2 Rol. Abr. 416. p. 4.* This resolution is founded on a rule laid down in the old books, that he who takes by description or purchase as heir, must be heir general or complete heir: For instance; if lands are devised to the heirs of J. S. and J. S. is living at the death of the testator, the devise is void, for *non est hæres viventis*; so if lands are devised to the right heirs male of J. S. and the heir of J. S. is a female, the devise is void; or if the devise had been to the heirs female, and the right heir had been a male, it would be void in the same manner; to which purpose see *Moor 860. Co. Litt. 24. b. 2 Leon. 70. Dier 99. Hob. 33. Co. Archer's case and Shelley's case*; but notwithstanding these authorities, it has in modern cases been held, that a special heir may take by purchase, and that a description of a person by the name of heir, though not heir general, operating with the intention of the testator, is sufficient to ascertain the person to take.

A man devised lands to A. and his heirs during the life of B. in trust for B. and after the decease of B. to the heirs male of the body of B. now living, B. having then a son. It was held, that by this devise the remainder immediately vested in the son; for the words, *heirs male now living*, are a full description of the son, who was then heir apparent of B. and known by the devisor (who was his uncle and godfather) to be so. *James and Richardson, 2 Jones 99. 2 Lev. 232. 2 Vent. 311. Raym. 330. Carth. 154. 3 Keb. 832. Pol. 457. Vent. 334. Comb. 153. Skin. 205. 2 D. A. 515. p. 7.*

I give

I give to my eldest heir male, and his heirs male for ever, all my lands in D. and if there be a female, she to have 12l. per Annum for life; the testator had two sons, the eldest of which died in his life-time, leaving issue a daughter. It was held, that the lands should go to the second son, and not to the daughter of the eldest, though she was heir general. Trin. 3 W. 3. Rot. 1484. C. B. Baker and Hall.

A. devised all his lands to B. and C. and the survivor of them for twenty-one years, for payment of debts and legacies, and after payment the term to cease; and after the end, or other sooner determination of that estate, he devised the premises to the first son of his body in tail male, remainder to B. for ninety-nine years, if he lived so long, without impeachment of waste, remainder to the first and other sons of B. in tail male, remainder to C. for ninety years, if he lived so long, remainder to the first and other sons of C. in tail male, remainder to the heirs male of his aunt Elizabeth Long, lawfully begotten, remainder to his own right heirs; he gave 150l. per Annum to his sister Dorothy Beaumont for life, and 500l. to her children, 100l. to his aunt Elizabeth Long, and 500l. to her children, and died without issue; B. and C. entered by virtue of the devise for twenty-one years, and afterwards both died without issue; John Beaumont and Dorothy his wife entered in right of Dorothy, as heir at law to the testator; the term of twenty-one years being determined, Thomas Long, eldest son of Elizabeth (she having at the time of the devise three sons) entered and brought an ejectment, and in the Exchequer judgment was given for the plaintiff Thomas Long, by chief baron Ward, Price, and Lovel against baron Bury. In Trin. 1713. this judgment was reversed in the Exchequer-chamber; and upon a writ of error brought in the House of Lords, it was argued, that the judgment of reversal should be

affirmed: 1. Because *Dorothy* being heir at law, her right as such was to be favoured, and devises to disinherit an heir, ought to be taken strictly. 2. That to make this devise to *Thomas Long* good, it must be construed either a contingent remainder, or the words *heirs male* must be taken as a *descriptio personæ*; to vest in him as a contingent remainder, it cannot be good for want of a freehold to support it, all the preceding estates being only for years; besides, if it was good as a contingent remainder in its creation, yet *Elizabeth Long* the mother being alive when the particular estate determined, it cannot vest, because *Non est hæres viventis*; as a *descriptio personæ* it cannot vest, for that ought to be such a description as is *vice nominis*, which the words *heirs male* (being a legal term, and not accompanied with any other words to determine the sense, otherwise as heir apparent, or heir now living, &c.) cannot amount to, and the word *begotten* doth not determine the sense otherwise; nor does any intent appear to confine the devise to the issue male of *Elizabeth Long*, much less to *Thomas Long* only, as the person described in this devise. Notwithstanding these reasons the judgment of reversal was reversed, and the first judgment affirmed, though ten judges held the devise void, and only the three judges (*Lovel* being dead) before-mentioned held the devise good. *Mich. 1713. in Domo Procerum, Beaumont and Long.* See *Will. Rep. 229. pl. 50. Fortesc. Rep. 18. 2 Eq. Cas. Abr. 331. pl. 3.*

J. S. devised to trustees in trust, after debts and legacies paid, to convey to *A.* his cousin, and the heirs male of his body, and for want of such heirs male, then to the heirs male of the body of *B.* his grandfather, and for want of such heirs male to his own right heirs for ever; and gave his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and died; and soon after *A.* died without issue;

issue; and *C.* being heir male of *B.* the testator's grandfather, but not heir general, there being a daughter of an elder brother; the question was between him and the testator's sister, and heir at law, who had the 2000*l.* devised to her, whether the devise was good or not. The Lord Chancellor held that the devise was good, and that *C.* should take as a person sufficiently described and intended by the testator. *Newcomen and Barkham*, 2 *Vern.* 729.

Of Devises that are void by the Devisee's dying in the Life-time of the Devisor.

A Man devised lands to *A.* and his heirs, *A.* died in the life-time of the devisor. It was held that *B.* who was the heir of *A.* should take nothing by the will; though after the death of *A.* the devisor told *B.* that he should be his heir, and should have all the lands which *A.* should have had, had he out-lived the devisor; for the heirs of *A.* were not named as immediate takers, but only to express the quantity of the estate that *A.* should take. *Bret and Rigden, Plowd.* 345. vide 2 *Lev.* 243.

A. devised lands to *D.* and three others in fee, to the use of *J. S.* her brother, and to the heirs male of his body, and for want of such issue to the heirs female of his body, with divers remainders over; *J. S.* died in the life-time of *A.* leaving issue a daughter, and his wife with child of a son, which was afterwards born; afterwards *A.* died. The question was, whether the son or the daughter of *J. S.* had right to the lands. It was resolved, that neither of them should have the land; for it being to the use of *J. S.* *ut supra*, and he dying before the devisor, this cannot vest in the heir, for it never vested in the ancestor; for the word *heirs* is not to give the immediate estate but by

Of devises void by the devisee's dying in the life-time of the devisor.

by way of limitation; and if this should vest in the heir, it would vest in him as a purchaser, which was not the intent of the devisor. *Hartop's Case*, *Cro. Eliz.* 243. *Leon.* 253. 1 *D. A.* 538. p. 2.

But if there be a devise to *A.* for life, remainder to *B.* in fee, though *A.* dies in the life-time of the devisor, *B.* shall take; or if *A.* refuses, *B.* shall take. *Plowd.* 344. *Cro. El.* 423. 1 *Co.* 101. a.

A man devised his land to his wife for wife, and after to his four daughters and their heirs, equally to be divided between them, share and share alike, to hold to them and their heirs for ever; one of the daughters dies, leaving issue a son, and then the devisor dies; the devise is void for a fourth part. *Packman and Cole*, 2 *A. D.* 538. p. 3. 2 *Sid.* 53, 78.

In a manuscript report I have of this case it is stated thus: *J. S.* having issue four daughters, devised lands to his said four daughters and their heirs equally, share and share alike, and one of the daughters had issue in the life-time of the testator, and died, and afterwards the testator died. It was held, that the daughters were made tenants in common. *Dickins and Marsh*, *Cro. Eliz.* 330. *Moor* 594. *Goldf.* 182. 3 *D. A.* 175. p. 13. Every one of the sisters was to take but a fourth part; the intent of a will shall be expounded from the time of the making, and so the will shall not be void as to the heir of the sister that died during the life of the testator.

A. having issue two daughters, *B.* and *C.* devises some tithes and money to *B.* and gives legacies to her children, but declares, that she having married without his consent, should have no part of his real estate, and thereupon devises his real estate to *C.* in tail, remainder to *B.* for life, remainder to her first and other sons, &c. *C.* dies in the life-time of the testator leaving issue, the devisor dies; *B.* is intitled immediately to the land, though
contrary

contrary to the intention of the testator. *Hutton and Simpson. 2 Vern. 722.*

A man devised lands to A. and B. and their heirs; A. dies in the life-time of the devisor, B. shall take the whole land. *Davis and Kemp, Carter 4, 5. 2 D. A. 538. p. 4.*

Of Devises of Copyhold Lands.

IF a man devises copyhold lands to a charity, it shall be a good appointment within the statute of charitable uses, though there were no surrender to the use of his will. *Nelf. Ch. Rep. 75.*

Devise to a charity good without surrender.

A man who was tenant in tail of the trust of a copyhold estate, with remainder over, and the trustees refusing to surrender the legal estate to him, he brings his bill to compel them, and pending that suit, he goes to the lord's court and offers to surrender, but is refused, as not having the legal estate in him; thereupon he makes his will, and devises this estate to his wife and children. The court conceiving the will sufficient to bar the entail of a trust, and he having done all he could, decreed the estate to go according to the will. *Orway and Hutton, 2 Vern. 585.* *Cestuy que trust* of a copyhold having an equitable estate only, may devise it without any surrender. *2 Vern. 680.*

Devise of a tenant in tail of the trust of a copyhold, held good without a surrender.

A provision was made by will for younger children out of copyhold lands, but there was a defect in the surrender; it was held that the defect should be supplied against the eldest son and heir at law. *Hardman and Roberts, Vern. 132.* And in gavel-kind lands the want of a surrender shall be supplied as well in favour of an elder as a younger son. *2 Vern. 163.*

Defect of a surrender to a will supplied in favour of younger children.

Of gavel-kind in favour of an elder son.

A man devised copyhold lands to his grandson, but had made no surrender to the use of his will: Lord Somers decreed the will good, and that equity ought to supply a surrender in such a case as well

But whether in favour of a grandson?

as in the case of a son : But on an appeal to the house of lords this decree was reversed; and it was there held, that equity ought not to supply such defect in disfavour of the heir at law, unless it was in favour of a son or a daughter, nor then neither, if it was to disinherit the eldest son. *Kettle and Townshend, Salk. 187.*

In the case of *Fursaker and Townshend, Gilb. Rep. 139.* Lord Cowper seemed not satisfied with this, and said, that by *stat. 43 Eliz.* a man was obliged to provide for his grandchild, which he said he believed was not taken notice of in that case : And in the case of *Watts versus Bullus, Wil. Rep. 60. 2 Eq. Cas. Abr. 286. pl. 2.* the master of the Rolls said, that it was his opinion such a devise of a copyhold without a surrender, ought to be made good for grand-children as well as children ; and if the same case were to come now into the house of lords, it would be so ruled, and that he had and would decree it so. The like was also declared by lord Harcourt in the case of *Freestone versus Rant, Trin. 1712.*

Defect of a surrender of lands in Borough English not to be supplied in favour of an elder son where the younger son is unprovided for.

The testator devised his copyhold lands, being of the nature of *Borough English*, to his eldest son, and devised houses to his youngest son, which houses were soon after burnt down, and never entered upon by the younger son ; and as this case was circumstanced, the court would not supply the want of a surrender in favour of the eldest son. *Cooper and Cooper, 2 Vern. 265.*

If a man seised of freehold lands, and of the legal estate of *copyhold* lands, makes a general devise of all his manors, messuages, lands, tenements, and hereditaments, but makes no *surrender of the copyhold lands to the use of his will*, the copyhold lands will not pass. By lord Hardwicke, *Gibson, v. Stiles 2. Burn's Eccle. Law 551.*

Devise of a bond by the son to his mother, to her sole and separate use ; it is her sole property in equity,

equity and her assignment of it is good. *Rollse v. Budder. Bunb. Excheq. Rep.* 187. *pl.* 264.

A person seised of an estate in fee, devised it to the defendant's wife, who was his daughter, for her separate use, without any limitation to trustees; it was adjudged that the husband was but a trustee for the wife. *2 Wil. Rep.* 316. *pl.* 91.

Whether the *wife* is a relation within the statute of distributions, hath been made a question, as in the case of *Davis and Baily*, *Feb.* 8. 1747. The testator by his will gave the residue of his personal estate to his wife for life, remainder to such of his relations as would have been intitled by the statute in case he had died intestate; the wife claimed a moiety. By the lord chancellor *Hardwicke*: Relation here means kindred. The wife is not of kindred, nor a relation within the meaning of the statute. *Davis and Baily*, *2 Burn's Eccle. Law* 552.

And more particularly, in the case of *Worsley and Johnson*, *M.* 27 *G.* 2. The testator seised in fee, devised his estate to his wife for life, remainder to another in tail, and for want of issue the reversion in fee to be sold; with these words, *and my mind is, that the money arising from the sale be divided among such of my relations, and in such manner, as the statute of distributions directs*: Then he gave other legacies to his wife, and appointed her sole executrix; and died; leaving relations of his own blood, and his said wife, who married a second husband. Then the wife dies; and the second husband dies; and the tenant in tail dies without issue. The plaintiff brings his bill, as executor to the second husband, praying a sale of the estate, and a moiety of the money thence arising, as the representative of the second husband to the wife who was intitled to it by the will, as a relation within the statute of distribution. — Lord chancellor *Hardwicke*: During the course of this cause, I have altered my opinion. The question arises on the words of the will referring to the statute

statute of distribution, and depends upon the construction, which must be agreeable to the words, and to the intent of the testator to be from thence collected. The question is, what is the sense of the word *relation*, as used in this will. In a proper grammatical sense, it denotes a quality in the abstract; but in common sense, it becomes personal, and signifies the same as *my kindred*. Now next of *kindred* are the words in the statute to which he refers, and takes in only relations by consanguinity or by blood. Now it seems strange to say, that a man's wife is no relation to him; but she certainly is not in this sense, neither by blood nor affinity. The etymologists, when they speak of *consanguinity*, say, that it is *vinculum personarum ab eodem stipite descendendum*; and of *affinity*, they say, *uxor non est affinis, sed causa affinitatis*. And so the word appears to be used in our statutes: For if the wife was of kin to her husband, she would exclude all the rest, as being the nearest of kin. So in the 21 H. 8. c. 5. the ordinary shall grant administration to the widow, or next of kin, which distinguishes the wife from the kindred. This perhaps would be too nice a construction of the will, unless the manifest intent of the testator would warrant it; for wills are to be construed according to common understanding, and not by nice grammatical distinctions. Now in this will he has made an ample provision for the wife, and whenever he gives her an interest, he expressly mentions her. It was probable that this remote contingency would not happen in her life; and he could never intend, that her representative, such as the executor of a second husband, should carry so considerable a share from his own blood. Suppose he had said *my own relations*; he would certainly be construed to mean his relations by blood. Therefore in this strict sense of the words, the wife is not intitled to any share. And I continue in the same opinion I was of, in the case of

Davis

Davis and *Baily*; which is expressly to this point. And therefore I dismiss the bill; but without costs.

Worsley and *Johnson*, 2 *Burn's Eccle. Law* 553.

In the case of *Rigden* and *Valier*, *March 25*, ^{Estate equally to be divided.}

1751. The question arose on a deed poll, which began in this manner, "To all christian people, &c. I *George Everenden*, in consideration of natural love and affection, &c. and for the firm settling and assuring of all my real and personal estate on my wife and children after my decease, dispose thereof in the manner following; I give, grant, and confirm to my daughter *Margaret* &c. [this was not in question.] Also, I give, grant, and confirm to my daughters *Margaret* and *Hannah* the rents and profits of the lands called *W.* during the life of my wife, equally to be divided betwixt my said daughters, paying to my wife ——— *per Annum*; and after her decease to them and their heirs, *equally to be divided betwixt them*. Also, I give, grant, and confirm to my five daughters all my personal estate equally to be divided betwixt them, after all my debts and funeral charges paid and satisfied." This deed was signed and sealed by *George Everenden* in the presence of three witnesses. He and his wife died. *Hannah*, one of the daughters, married *Rigden*, by whom she had the plaintiffs and died. The question was, whether *Margaret* and *Hannah* took as jointenants, or as tenants in common. If the latter; the plaintiffs, who brought their bill for an account of the rents and profits of a moiety of the estate given to *Margaret* and their mother *Hannah*, and claimed as co-heirs of *Hannah*, were right: If the former, the whole survived to the defendant *Margaret*, as the survivor of her sister. ——— By the lord chancellor *Hardwicke*: This case depends upon a deed or writing, which, though executed as a deed, I am not sure was intended to take effect as such. It begins a deed poll; but it is the disposition of the whole real and personal estate

estate of *Everenden*, and to take place from his decease, and in consideration of the natural love and affection he bore to his wife and children. If it be not construed as a will, or covenant to stand seised, (and being in consideration of natural love and affection, though by a single deed without livery, it may be considered to be a covenant to stand seised,) it will be void, being without livery, because a freehold cannot pass *in futuro*. But by way of covenant to stand seised, it may be good; for that operates not by transmutation of the possession, but the use remains in the grantor till taken out of him by force of the consideration. The present question arises upon a very litigated point in the books, though clear enough in one view. In a *will* the words *equally to be divided* certainly create a tenancy in common, though this at first was doubted; nay the words *equally* or *share and share alike* have the same effect. But it is said, that there is not sufficient authority to establish these words to make a tenancy in common in a *deed*, and that the books take the law to be otherwise. It is true, the books do so generally. And yet there is no solemn determination that I can find, where it has been adjudged against a title, that the words *equally to be divided* will not create a tenancy in common in a deed. The only determination that hath been, was in the case of *Fisher and Wig* (*L. Raym.* 623. *Wil. Rep.* 14.) which hath been relied on as a judgment of the court of *King's Bench*, that these words make a tenancy in common in a deed. But it is objected that this is a case of doubtful authority, being on the opinion of two judges, against so great a man as lord chief justice *Holt*; and it is apprehended too, that his judgment was afterwards reversed. I have made inquiry, and cannot find that it was, or that even a writ of error was brought: So that this judgment yet stands, and is so far an authority, that this construction
in

in regard to the words *equally to be divided*, making a tenancy in common, took place in case of the surrender of copyhold lands. — Another case has been cited at the bar, which, if rightly reported, is in point, 2 *Ventr.* 361. But I have caused the register books to be searched, and can find no decree to warrant the report: But notwithstanding this, there might have been such a case, and it is taken by *Gould* that there was. — Another case is mentioned at the end of *Fisher and Wig*, by *Northey*; but the records have been searched, and there is no possibility of finding it. — *Smith* and *Johnson* too is another authority, such as it is. — In regard to the case before me, upon the best consideration I can give it, I am inclined to be of opinion, that the deed or instrument, call it what you will, has created a tenancy in common, and that to say otherwise, would be a manifest contradiction to the intention of a father providing for his children. Though none has a greater reverence for the opinion of lord chief justice *Holt* than I have, I think the arguments of the other judges are founded more on the reason and nature of the thing than his lordship's; and that his proceed from the artificial and refined reasoning of the law, and are deduced from a great deal of fine learning drawn from arguments in other cases. The arguments of Mr. justice *Gould* have a great weight, and are by no means satisfactorily answered. Indeed that case was on a surrender of copyhold lands in the lord's court: and the two argued it was not to be considered with great strictness, but as a will: Whereas *Holt* contended that it should be construed as a deed; and in one thing he is certainly right, that the surrender of copyhold lands to uses is not to be considered on the foot of uses, being not within the statute of uses; and therefore such a surrender is only a direction of the lord whom to admit; and when admitted, the surrenderee is not

in by grant of the lord, but by the surrender. If the argument of the judges had any weight in that case, they must have full as much in this, being on a covenant to stand seised. But it is objected, that there is no warrant to construe a deed to uses, as to the limitations and words of it, with greater latitude than a conveyance by way of feoffment, or any other conveyance at common law; and that strange confusion would arise, if the words of a deed on the statute of uses should be taken in a larger sense than they would bear in a conveyance at common law. This is true in general: For the statute joining the estate to the use, it becomes one intire conveyance by force of the statute. But some restriction must be added to this. The words of limitation, to be sure, must be construed in the same sense as at common law. But when there are words of regulation or modification of the estate (as the words *equally to be divided* are), and not words of limitation; I think there is no more harm in giving them a greater latitude in deeds on the statute of uses, which are trusts at common law, than in feoffments, which at all times have been strict conveyances. The case upon that occasion cited by *Gould*, is very material; where the intendment, not the words of the special verdict, influenced the determination. Consider the argument from thence to the present case. The only distinction taken between the construction of words in a special verdict and in other cases is, that in a special verdict, they may be taken more largely than in pleading; and therefore it is often said, that a description, that would be bad in a count or plea, may be good in a verdict, and taken by the intendment of the jury: But there never was any book that said, that words may be taken more loosely in a special verdict than in a deed. It is admitted, that if the deed had been in this manner, to hold one moiety to one and her heirs, and the

the other moiety to the other and her heirs, this had been good, not only in such a deed as this, but likewise in a feoffment. And considering how the sense of the words *equally to be divided* is to be construed, there is no reasonable difference between the two cases. Thus the matter stands on the foot and authority of *Fisher* and *Wig.* — But there are other reasons which greatly strengthen the present case in favour of the plaintiffs. The first is this: Here is a parent making a provision for his children (who were five in number), and for his wife: if the children were to take this estate, intended for the support of each of them and their future families, as jointenants; the share of any one who should happen to die, would not descend for the maintenance of his children and posterity, but survive to the other jointenants; a disposition by no means reasonable, nor likely to be supposed agreeable to the intention of the father. And this court has always used a great latitude in pursuing the intent of the parties, in construing a deed to make a tenancy in common or a jointenancy, though the words *equally to be divided* have been omitted; and have determined therefore, that if two men jointly and equally advance a sum of money on a mortgage in fee, and take a security to them and their heirs, there shall be no survivorship; and so, if they foreclose an estate, it shall be divided betwixt them, because their intention is supposed to be so. It has been said indeed, if two men make a purchase, they may be supposed to buy a kind of chance between them, and to intend that the survivor shall be intitled to the whole. But it has been determined, that if two purchase, and one advance more than the other; there shall be no survivorship, though there be no such words as *equally to be divided*, or to hold as tenants in common: Which shews, how strongly the courts have leaned against survivorship, and erected a tenancy in common, by

construction, on the intention of the parties. Consider how nearly this comes to the case in question. And this court always considers provisions for children, as having an equitable consideration. And therefore though such voluntary dispositions cannot be preferred to debts for valuable consideration; yet they are always preferred to other voluntary dispositions. — But *George Everenden* has himself put his own construction on the words, by the disposition of his *personal estate*; which is allowed to make a tenancy in common. — Besides, this appears to be as near a testamentary act as possible; nor do I know why it may not be proved as a will, notwithstanding the solemnity of the execution by sealing and delivery: According to the case of *Kibbet and Lee* (*Hob.* 313.) And a late determination in the *King's Bench* in the case of *Trimmer and Jackson*. And it is admitted, that in a will, these words make a tenancy in common; and I think it ought to be so here. My opinion therefore at present is, that agreeable to the case of *Fisher and Wig*, strengthened by the farther observations already made, the plaintiffs are intitled to a division of the estate. *Rigden and Valier*, 2 *Burn's Eccle. Law* 554.

In the case of *Goodtitle and Stoakes*, in the *King's Bench*: *H.* 27 *G.* 2. By indentures of lease and release, dated in the year 1695, and made between *John Guise* and his wife of the one part, and *William Purefoy* and *Peter Capper* of the other part, the said *John Guise* granted and released to the said *Purefoy* and *Capper* and their heirs, the lands in question, to the use of such and so many of the children of the said *Guise*, on the body of his said wife begotten, in such manner, and in such shares, as the said *John Guise* shall appoint; and in default of such appointment, *to the use of all such children equally to be divided*: With a remainder to the right heirs of the said *John Guise*. — *John Guise*

Guise died, without making any appointment, leaving his widow, and children *Richard, Jane, Peter and Wilmot*. — The question was, whether by the words "*To the use of all such children equally to be divided*," the children took as tenants in common, or as jointenants, in which case *Wilmot* who married the defendant, being the only surviving child, would take the whole. — *Lee Ch. J.* delivered the opinion of the court: This case depends upon the clause (above mentioned.) The defendants have insisted, they ought to take as jointenants. Jointenants must be to the land in one right, and by one joint title, and they must have one joint freehold. Tenants in common take differently, as is laid down, *1 Inst. sect. 292, 296, 297*; from which it does appear, that no particular words are necessary to create a tenancy in common. The question then comes to this; whether the children do not take several freeholds, with a several occupation? to make them tenants in common, would be to construe every word in this deed as operative. No words in a devise or a grant shall be construed void, if they can be construed otherwise consistently. (3 *Lev.* 373.) There is no doubt at this time of day, but that the words, *equally to be divided*, in a will, make a tenancy in common. In the case *Cro. Eliz.* 443, 695. It was first determined to be so. There is no determination where in a deed to uses they will. It has been objected, they have a joint title in the freehold; and the words *equally to be divided* will not sever it: And though the statute of uses executes the use to the possession; yet it leaves the estate subject to the same uses: The intent cannot prevail here; and these words, in a conveyance at common law, would not create a tenancy in common. But the question here is not, whether the joint title is severed; but, whether any joint title is conveyed. If land be given to *A. & B.* to hold one moiety to *A.* and

his heirs, and the other moiety to *B.* and his heirs, they take as tenants in common. And where the grantor in the same clause, and *uno flatu*, uses the words *equally to be divided*, he intends to convey an equal property in the land, and to the fee, to each. This is the opinion of *Popham, Cro. Eliz.* 696, in his argument. I cannot think the clause here is nugatory, or of no effect. The intent of the party operates to pass the whole fee. There is no rule in law, to prevent the court from making a construction according to the intent of the party, in a deed. The true reason, why the words *equally to be divided* make a tenancy in common, is from the apparent intent that the estate should be divided: And such a construction ought to be made, if there be no rule to the contrary; And no precise words are necessary. The case in *2 Ventr.* 365. is in point: A covenant to stand seised to the use of *A.* for life; and after, to two equally to be divided. *1 Inst.* 191. *a.* If a verdict find that a man hath two parts of a manor, or the like, to be divided into three parts; they are tenants in common, by the intendment of the verdict; and if in a verdict, there is no reason why not in a deed. *Carth.* 343. *Leigh v. Brace.* A conveyance by way of the use shall be construed as a will, with respect to the intention of the parties. The case of *Fisher and Wig* cannot now be departed from: It is mentioned in the case of *Philips and Stringer*, as if this judgment had been reversed; but it was not. The whole reasoning of *Holt's* argument, in the said case of *Fisher and Wig*, is applied to the supposition of a conveyance at common law: But it does not from that appear, what his opinion would have been, upon direct uses as here. In the case of *Rigden and Valier*, lord *Hardwicke* Ch. J. declared, upon the best consideration he could give the case, that he was inclined to think, that the words *equally to be divided*, where in a will or deed, create a tenancy in common. —

mon. — And judgment was given for the plaintiff by the whole court. *Goodtitle and Stoakes*, 2 *Burn's Eccle. Law* 557.

A devise of all a man's goods and mortgages to his executors, is a good devise, and will pass all the lands mortgaged; for the equity of redemption passeth to the devisee. *God. Orph. Leg.* 477. *Cro. Car.* 37.

Devise of mortgages passeth the lands.

But by a general devise of all lands tenements and hereditaments, mortgages in fee (though forfeited) will not pass; nor will they pass by such a general devise, though the equity of redemption is after the making of the will foreclosed or released. 2 *Bac. Abr.* 83.

By the word *lands*, an advowson will not pass; but by *hereditaments* it may. *Fortesc. Rep.* 351.

But fee farm rents, portions of tithes, or any other right out of lands, will pass by a devise of lands. 8 *Vin. Abr.* 204. *pl.* 10. 205. *pl.* 11.

Tithes, fee farm rents.

A man by his will devises his leasehold estate, and other his chattels real, to his son *William*, and to the issue of his body; and if he die without issue, to his son *B.* and the issue of his body, and if he die without issue, to *C. &c.*

Devise of a leasehold in tail with remainders over, the whole vests in the first devisee. *Roll. Abr.* 611. *L.* 1. *Moor* 817. *Sid.* 7. 2 *Vern* 43.

Per totam curiam, The whole interest vests in *William*, and shall go to his executors or administrators, and the limitations over are void.

A man devises all his freehold houses, lands and hereditaments in *Witchaven* to three trustees, to hold to them in trust, that the freehold estate shall be subject to, and be sold and disposed of by them for payment of his just debts; and after disposing of some particular legacies he gave to his nephew the rest, and residue of his goods, chattels, debts, rights, credits, and personal estate not before disposed of.

Freehold estate devised to be sold, for payment of debts, yet the personal shall be first applied, there being no negative words.

Thereupon the question was, whether the personal estate should be first applied to the pay-

ment of the debts notwithstanding the real estate was expressly devised for that purpose.

The counsel for the defendants (who were the trustees and residuary legatee) insisted, that the real estate being not only made subject, but directed to be sold for payment of the debts, the personal estate should not be applied for that purpose, and cited 1 *Lev.* 203. 2 *Vern.* 718.

But *per totam curiam*, There being no negative words to exclude the personal estate from being applied for the payment of debts, *that* ought to be first applied for the benefit of the heir at law (who was the plaintiff); and decreed accordingly. *Fereyes v. Robertson & al.* *Bunb. Excheq.* 301. pl. 385.

In ejectment at the sittings at *Guild-Hall* the following case was made for the opinion of the court; *J. S.* being possessed of a term, devised it, "*To my wife for her life, and after her decease to such child as my said wife is now supposed to be with child and ensient of, and his heirs for ever; provided always, that if such child, as shall happen to be born as aforesaid, shall die before it has attained the age of twenty-one years, leaving no issue of it's body, then the reversion of one third part to my said wife, and the other two thirds to my sisters A. and B.*" The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage; and upon her death the question was, whether, as no child had ever been born, the remainders, limited upon his dying under twenty-one without issue, could take effect? And after several arguments, the court held that they might; that though formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant *in ventre sa mere* was well limited, and if any child had been born, would have passed the term accordingly. Secondly, that though no child was ever born, yet *the remainders are notwithstanding good*; for there being no devisee, the

the devise, though void only *ex post facto*, falls to the ground as much as if it had been void in it's creation; and this lets in the remainders immediately; that though the clause by which the remainders are limited is in words, strictly speaking, conditional, yet they do not make it a condition, but only a limitation. Lastly, that the contingencies must happen within a reasonable time, and therefore it may well operate by way of executory devise. *Andrews on the demise of Jones v. Fulham*, 8 Vin. Abr. 103. pl. 53. S. P. in Eq. Cas. Abr. 245. pl. 10.

CHAP.

C H A P. IV.

Of Legacies, Donatio causa Mortis; What Things may be bequeathed; What Quantity; Customs of London and York; Description of the Legacy; Of the Legatee; Lapsed Legacies; Legatee's dying in the Life-time of the Testator; Before the Time of Payment; Legacies to be raised out of Lands sinking into the Inheritance; Of specific Legacies; Abating and refunding; Time of paying a Legacy; To whom to be paid; Of Interest and Maintenance; Of Contribution by the Devisee; Ademption of a Legacy; When a Thing devised shall go in Satisfaction of a Thing due; Legacies limited over; Devise to charitable Uses; and of collateral Proof to explain the Testator's Meaning.

Definition of a legacy.

A Legacy is a gift left by the deceased, to be paid or performed by the executor or administrator; and herein four things are to be noted.

A legacy proceedeth of the liberality of testator.

First, As it is called a gift, it argueth that it proceeds of the mere liberality and free good will of the testator, and consequently that he is not of necessity tied to give it.

It differeth from a donatio causa mortis, and other gifts.

Secondly, As it is left, it differs from other gifts, not only those which are called deeds of gift, executed and effected in the life-time of the donor, but also from those gifts which he made in consideration of death, wherein the things given are delivered by the testator in his life-time to become their own, to whom they are delivered in case the testator shall die; for legacies are not delivered by the testator, but are to be paid by his executor or administrator.

Thirdly,

Thirdly, Inasmuch as the legacy is to be paid by the executor or administrator, it is not therefore lawful for the legatee to take the legacy of his own sole authority, for only the executor may of his own sole authority take possession of the goods and chattels of the deceased. Legatee not to take the legacy of his own authority.

Fourthly, As there is mention as well of the administrator as of the executor, not only those legacies are due which are left in a testament, wherein an executor is appointed, and where the party doth not die intestate, but those legacies also which are left in a codicil or last will, wherein no executor is appointed, and where the party dies intestate; which legacies as they are due, so they are payable in both cases; in the one case by the executor, and in the other by the administrator: If legacies be left in a testament, although the executor therein named cannot be executor, or do refuse the executorship, and so the party dieth in a manner intestate, and thereupon administration is granted of his goods, the legacies are due and payable by the administrator. Legacies payable by the administrator as well as by the executor.

*Of a Gift in Consideration, or because of Death,
or a Donatio mortis causa.*

A Gift in consideration of death, is where a man, moved with the consideration of his mortality, doth give and deliver something to another, to be his, in case the giver die, but if he lives he is to have it again. Of gifts in case of death there are three sorts; one when the giver is not terrified with any present peril, but moved with a general consideration of man's mortality, giveth any thing: Another, when the giver being moved with imminent danger doth so give, that immediately it is made his to whom it is given: The third is, when a man being in peril of death, doth give something, but not so that it shall be immediately Donatio mortis causa, what it is.

Three sorts.

Which of them
is compared to a
legacy.

diately his who receives it, but in case the giver die. This last kind of gift is that which is compared to a legacy, but the other two are reputed simple gifts, if the giver do not make express mention of his death, and so they cannot be revoked, but take full effect from the time of making the gift, if it be not fraudulent. *Vide Stat. 13 Eliz. c. 5. 14 Eliz. c. 11.*

A gift by a man
in his life-time
not to be construed
donatio
causa mortis.

Sir William Hedges gave by will to two of his children a specific legacy of a bond for 3000 *l.* but being advised to give it them by act in his life-time, a line was by the attorney drawn over those words in the will, which gave the 3000 *l.* and the bond was altered and a new security taken in trust for those children, and the will new published. *Per Cur.* This cannot be construed a legacy *causa mortis*, that is, where a man lies in *extremis*, or being surprized with sickness, and not having an opportunity to make his will, but lest he should die before he can make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy, but if he recovers, then does the property thereof revert to him; but in this case the testator Sir William acted deliberately, and made his election that they should take by a gift in his life-time, and not by will. *Mich. 7 Annæ, Hedges versus Hedges, Gilbert's Rep. 12.*

Donatio mortis
causa after a will
and legacy of the
residuum, good.

The testator, being about making his will, directed the scrivener to give 100 *l.* to his nephew, but afterwards recollecting that his nephew had 100 *l.* of his in his hands, ordered the scrivener not to put the legacy into his will: The testator made *B.* his niece executrix, and residuary legatee; afterwards the nephew brought to the testator a specie bill for the 100 *l.* The testator, in his last sickness, gave the said 100 *l.* bill to be delivered over to his nephew in case he died of that sickness, which accordingly happened: The nephew bringing a bill for this 100 *l.* note, it was objected, that this being a parol gift, and contrary to the will

by

by which the executrix was made residuary legatee, it would introduce all the inconveniencies of perjury, which the statute of frauds intended to prevent, if such evidence or verbal dispositions should prevail against the will, and would be contrary to the words of the statute 29 Car. 2. c. 3. §. 22. which say a will in writing shall not be revoked by parol.

Lord Chancellor: The case is not so strong, as if this very 100*l.* had been specifically devised; for devising the *residuum*, is only the rest of his estate that he should not by will or otherwise dispose of; but this is a gift in the testator's life-time, *donatio causa mortis*, and the possession transmitted, and certainly, notwithstanding the will, the testator had a power to give away any part of his estate in his life-time; he might in his life-time, after the making of his will, give away any part of his estate *absolutely*, and by the same reason might, notwithstanding the will, give away any part of his estate *conditionally*. Decreed the plaintiff his 100*l.* and costs. Hil. 1717. Drury vers. Smith, Wil. Rep. 404. 2 Eq. Caf. Abr. 575. pl. 3.

Memorandum, In the case of Smith versus Casen, Not good against (8 Dec. 1718.) the master of the Rolls, where debts. jewels were given by the testator by way of *donatio causa mortis*, doubted whether this was good against debts. And it seems not, they being given in case of the donor's death, and in nature of a legacy, which therefore would be fraudulent as against creditors. Wil. Rep. 406.

A man being much in debt, six hours before his decease, gave 600*l.* for the benefit of younger children; this is not fraudulent as against creditors, though it would have been so of a real estate, or chattel real; though the court would not have it to be taken so *pro confesso*, but would have directed an issue to try it; and so it was done in lord Somers's time, and on issue directed was determined fraudulent before lord C. J. Holt, 14 July 1729. Duffin vers. Furness, Select Cases in Chancery 77.

The

The husband in extremis gives his wife 100 guineas, and a bill for 100*l.* to buy mourning; the first operates as a *donatio mortis causa*, the latter as an appointment.

The testator being languishing upon his death-bed, delivered to his wife a purse of gold, containing about 100 guineas, and bid her *apply it to no other use but her own*: and likewise drew a bill upon a goldsmith to pay 100*l.* to his wife to buy her mourning, and to maintain her until her life-rent (meaning her jointure) should become due; and about seventeen days after died. *The Master of the Rolls*: The delivery of the purse was good, and must operate as a *donatio causa mortis, ut res magis valeat, &c.* because otherwise one could not give to his own wife, and this was in the nature of a legacy to the wife. The bill of 100*l.* is good, and operates as an appointment; if the wife had received it during his life-time, it would have been liable to some dispute; but that he apprehended this amounted to a direction to his executors, that the 100*l.* should be appropriated to the wife's use: And he inclined to think, that even if the wife had received it in the husband's life-time, she should have kept it; that being for mourning it might operate like a direction touching his funeral. The gifts were not extravagant, (for then he admitted equity ought not to make them good) the gifts were but 200*l.* and the personal estate amounted to 8000*l.* Wherefore it was decreed accordingly. *Trin. 1718. Lawson versus Lawson, Wil. Rep. 441. 2 Eq. Cas. Abr. 575. pl. 4.*

Donatio causa mortis of bank notes.

One *Cowper*, after making his will, and three or four days before his death, gave Mrs. *Dawson* some bank notes to her own use if he died, else to be returned. On his death *Ashon*, who was his executor, on inquiring into the affair, said he was well pleased that they were given to her. She desired him to keep the notes, and employ them to the best advantage for her; he took them, and gave her a note for them; but she afterwards marrying against his inclination, he refused to deliver up the notes. *Cur'*: This is not a legacy, nor is there any occasion for the executor's assent to it; it is not

not a gift at common law, but in view of death, here are exprefs words; but if he had used no words, and been near death, it had been looked upon as a *donatio mortis causa*; it is a testamentary legacy, of which the common law takes notice, but not provable in the ecclesiastical court; it is only necessary here, and the executor's assent is not necessary, because the Party might die intestate. This further differs from a legacy, which depends solely on the disposing words; but in a *donatio mortis causa* there must be delivery, which is something more. On re-hearing the lord chancellor inclined to have ordered a trial, had not Mr. *Ashton* given a note, 5 May 1725. *Ashton* vers. *Dawson*, *Select Cases in Chancery* 14. *Prec. Chanc.* 300.

Need not be proved in the spiritual court, *Williams* 441.

An executor libelled in the spiritual court for taking a tankard without his consent, on pretence that the testator gave it the defendant if he died of his then sickness. And the court granted a prohibition, this not being a legacy, but a *donatio causa mortis*, the validity whereof may be tried in an action of trover. *Thomson v. Batty*, 2 *Sira.*

Donatio causa mortis, not sueable in spiritual court.

777.

As concerning the devise of goods and personal chattels; all manner of goods and personal chattels may be bequeathed by will, certain cases only excepted.

Of wills of goods and personal chattels.

The testator may not only give that thing which is extant, and in being at the time of making the will or death of the testator, but also that thing which is *in rerum natura*, whilst the testator liveth; as he may bequeath the corn which shall be sown or grow in such a soil after his death, or the lambs which shall come of his flock of sheep the next year depasturing in such a field; but if there be no such corn growing in that soil, nor any lambs arising out of that flock, the legacy is void, because no such thing is extant at all. Yet if he devise a certain quantity of corn, or number of lambs, as

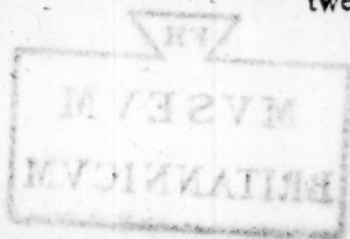
Testator may devise things not extant in his life-time.

As the corn to grow in such a field after his death.

But if no such corn growing, legacy void.

If he devise 20 quarters of corn, to be paid out of the corn which grows in such a

twenty



field, the legacy is due though not so much, or none at all, grow there.

twenty quarters of corn, or twenty lambs, to be paid out of the corn which shall grow in such a field, or arise of his sheep depasturing in such a ground, though not so much corn or none at all grow there, or no lambs, or not so many arise there, the executor must pay the whole legacies; for the mention of the soil and of the flock was rather by way of demonstration than condition, rather shewing by what means the legacy should be paid, than whether it should be paid at all.

May devise a debt, or chose in action.

If the testator bequeath unto another any debt due unto him, or a thing in action belonging unto him, the legacy is good; if the legatee be executor of that particular debt or thing in action, he may sue for the same in his own name; but if the legatee be not made executor of that debt or thing in action, he may compel the executor to sue for the same, and pay it over to him. It has been said, that if the testator after the making his will exact the debt bequeathed, the legacy is void: But see the following cases.

By the testator's recovering the debt, the legacy is void. Q.

But not if voluntarily paid in.

The testator bequeathed thus: I give to my uncle the sum of 500*l.* that is to say, the bond he gave me for 400*l.* and 100*l.* in money; the uncle in the testator's life-time paid off 320*l.* took up the bond, and gave a new bond for the remaining 80*l.* the testator died: It was decreed, that the 80*l.* bond should be delivered up, and that the residue of the legacy should be paid; for the diversity is, where the money is voluntarily paid in, and where the testator sues for and recovers it: In the first case the legacy continues still good, because the money only comes home to the personal estate; but in the other, the testator, by suing for it, shews he intended to make it his own, and therefore would not leave it to the legatee to recover, and the justice of the uncle ought not to prevent the affection of the nephew; and no alteration of his intention appears. *Hill. 1711. Orm and Smith, 2 Vern. 681. Rep. Eq. 82.*

One



One by will devised thus: *Item*, I bequeath to my granddaughter, *Mary Ford*, the sum of 40*l.* being part of a debt owing to me for rent from *G. M.* she allowing what charges shall be expended in getting in the same. *Item*, I bequeath to my grandsons *A.* and *B.* the residue of what is owing to me from the said *G. M.* which is about 40*l.* more, to be equally divided between them, they allowing charges as aforesaid: After the testator received the whole debt owing from *G. M.* The granddaughter brought a bill for her legacy; it was insisted that there was a difference between voluntary and compulsory payments, though the first was no ademption, yet that the second was, and that the testator compelled *G. M.* to pay in the money. The lord chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment; for the latter might be with an intent to secure the legacy at all events, and decreed the plaintiff the 40*l.* legacy. *Trin.* 1728. *Ford and Fleming*, 2 *Wit. Rep.* 469. *Vide Roll. Ab.* 614. *Moor* 789. *Raym.* 335. *Swin.* p. 7. §. 20. *Wentw.* 24. *Eq. Caf. Abr.* 302. pl. 3.

The difference between voluntary and compulsory payments disallowed; the latter may be to secure the legacy.

If the husband make his will of a debt, or other thing in action which he hath in right of his wife, the legacy is void; and so it is of any chattel real or lease, which he holdeth in right of his wife, or if he have the next avoidance of a church in her right, for after the husband's death they return to the wife; yet his gift or grant of them taking effect in his life-time, would bind the wife, and carry away the interest from her.

Legacy of a chose in action, or lease, which the testator hath in right of his wife, is void.

If the testator hath no such thing of his own as is bequeathed, yet the legacy is good; as if he bequeath a horse, or a yoke of oxen, the legacy is good though the testator hath neither horse nor oxen of his own: It may be asked, to whom the choice in this case doth belong? If the words of the devise be directed to the legatee, as thus: I

Legacy of a thing which the testator hath not, as to bequeath a horse though he has none, is good.

O will

will that *A. B.* shall have a horse, the choice belongs to the legatee; but if the words be directed to the executor, as to say, I will that my executor give *A. B.* a horse, the election belongs to the executor: But he that has the election must be reasonable in his choice, and frame himself according to the intention of the testator; otherwise the legatee might chuse the best horse in the country, or the executor the worst.

A legacy of the testator's portion of goods which he hath jointly with another, is void.

Except he be a joint-merchant.
Vern. 217. pl.

A legacy of goods which the testator hath as administrator to another, is void.

A man cannot bequeath by will any of those goods or chattels which he hath jointly with another, tho' by act in his life-time he might dispose of his part; if he bequeath his portion thereof to a third person, the legacy is void, and the survivor shall have the whole notwithstanding the will; if the testator make the other jointenant his executor, against whom a suit is commenced in the spiritual court, in a cause of legacy, the executor is not to be presumed to possess those goods, as executor, but as surviving jointenant, and shall therefore be dismissed, and the will in that respect be adjudged void. But joint-merchants are to be excepted out of this rule; for the wares, merchandizes, debts or duties, which they have as joint-merchants or partners, shall not survive, but shall go to the executor of him that dies, and this is *par legem mercatoriam*; for the rule is, *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*

An administrator cannot make a testament of those goods which he hath as administrator to any person dying intestate, because he has not those goods to his own proper use, but *in autre droit* to pay the debts, legacies, &c. of the deceased; and though the executor of an executor may administer the goods of the former testator, yet the executor of an administrator cannot administer the goods of the testator, but a new administration is to be committed by the ordinary, of the goods unadministered by the late administrator, as if such

administrator had died intestate. Hereby it appears, that the authority of an executor is greater than that of an administrator; for an executor may appoint an executor to the first testator, which an administrator cannot do; nevertheless, an executor cannot give away the goods of the testator by his will as legacies, no more than an administrator; for he has not those goods to his own use, but to perform the will of his testator. Or as executor.

Things belonging to any city, borough, corporation, college, or hospital, cannot be devised by the last will of the mayor or master. Mayor of a corporation cannot devise the goods thereof.

The goods of the church cannot be devised by testament, but the corn growing upon the glebe may be bequeathed, as I have said before, *fo.* Church goods not to be disposed of by will.

Such things as after the death of the testator would descend to the testator's heir at law, and not go to his executor, cannot be devised by any other testament than such as would have passed the land itself; as if by a testament not executed according to the statute of frauds, 29 Car. 2. c. 3. a man seised in fee, or fee-tail, bequeaths his trees growing upon the land at the time of his death, the devise is not good; but if he had bequeathed the corn growing upon the land at the time of his death from his heir to some other person, this had been good, although the land itself whereupon the corn grew, would not have passed by such a will: The reason of the difference is, because the trees are parcel of the freehold, and descend together with the land to the heir, and not to the executor; but it is not so of corn, for the same would go to the executor as parcel of the testator's goods. *Vide Perkins §. 511, 512, &c.* In what cases things that would descend to the heir, will not pass by a will.

As concerning the quantity of goods and chattels, which a man may dispose of by his will: A man can by his will dispose of no more of his personal estate than what shall remain after payment of his debts and moderate funeral charges; and therefore if the testator's debts, legacies, and funeral expences, exceed the amount of his personal estate, What quantity of goods, &c. may be disposed of by will. Only what remains after debts and funeral charges paid.

estate, and the executor pays the legacies, so that there is not sufficient of the personal estate left to pay the testator's debts, this shall be deemed a *devastavit* in the executor, as having paid legacies the testator could not bequeath, and he shall make good the deficiency out of his own pocket. Funeral expences are to be deducted out of the testator's personal estate both by the civil law and the law of the realm. *Fitz. Nat. Br. fo. 121. Doctor and Student, lib. 2. c. 10. Brooke Abridgment, Tit. Executor, n. 172.*

In some cases the testator may bequeath his whole personal estate (after debts and funeral charges deducted) in some cases the half, and in other cases one third.

By the common law the testator may dispose of his whole clear personal estate.

By the common laws of the land, if no particular custom hinders, the testator may by will dispose of his whole personal estate, except as is before mentioned, though formerly the law was held to be otherwise. *Vide Fitz. Nat. Br. de br. de rationab. part. bonor. Bracton de legibus & consuetud. Angl. lib. 2. c. 26. Magn. Charta, c. 18.*

By customs.

As to customs in the case of disposition by will of personal estates, the principal are the customs of the city of London and of the province of York; and these we shall consider under the following heads.

1. Where the testator hath neither wife nor child.
2. Where the testator hath a wife, and no children, or a child, or children, and no wife.
3. Where the testator hath both a wife and a child, or children.

Leaving neither wife nor child, may dispose of the whole.

As to the first head, if a man hath neither wife nor child at the time of his death, he may by will dispose of his whole personal estate after debts and funeral charges paid.

Leaving a wife only, or children only, he may dispose of half.

As to the second head, if the testator leaves a wife and no children, or a child or children, and no wife, he may by will dispose of one half of his personal estate, after debts and funeral charges paid;

paid; and the other half is due to the wife, or else to the child or children, by virtue of the custom.

1 *Williams* 341. *Salk.* 426. 2 *Vern.* 612.

As to the third head, if the testator leave both a wife and a child, or children, he can dispose of no more by his will than one third of his clear personal estate; for in this case the clear personal estate is to be divided into three parts, whereof by the custom the wife is to have the one third part, the child or children another third part, and the remaining third part, which is commonly called the deadman's or testamentary part, is subject to the will of the testator.

If both wife and children, he can dispose but of one third.

The common law and custom of particular places, though they differ in this respect are both grounded on good reason: On the one hand, supposing the husband unnatural, morose and brutish, and perhaps greatly enriched by his wife's portion; the wife a modest, virtuous, and tender woman; the children frugal, sober and dutiful; it seems very reasonable that such wife and children should be provided for, and that it should not be in the power of the testator to give all from them, and bestow it on others that merit not so much from him, and to send his wife and children a begging: As the law will bind him living to provide for them, it certainly ought to bind his effects after his death: But on the other hand, suppose the wife a very shrew, and perhaps an immodest and lewd woman, or the son idle, extravagant and undutiful, it seems hard that a man should be bound to leave to such a wife or child, the whole of his fortune, for which perhaps he had laboured the greatest part of his life; it then seems more reasonable that a man should be at liberty to dispose of his goods at his pleasure; especially as the wife and children understanding this, it will be a greater means of keeping them within the bounds of obedience and duty, and encouraging them to endeavour at gaining the good-will of the husband or father.

Common law and custom in this, both grounded on reason.

Of the customs
of London.

The customs of the city of *London*, and of the province of *York*, governing a great part of the personal estates of this kingdom, in the dispositions of them by will, we shall consider them more particularly; and first of the customs of the *City of London*.

Where freemen
of London may
dispose of t^heir
whole personal
estates.

It shall be lawful for all persons, who, after the first day of *June 1725*. shall become free of the city of *London*, and for all who shall that day be unmarried, and not have issue by any former marriage, to dispose of their personal estate. *Stat. 11 Geo. 1. c. 18. §. 17.*

But if agreement
to the contrary,
or they die in-
testate, then it
shall be subject
to the custom.

If any person who shall be free of the city of *London* hath agreed, or shall agree by writing, in consideration of his marriage, or otherwise, that his personal estate shall be distributed according to the custom of the city of *London*; or in case any person so free shall die intestate, his personal estate shall be subject to the custom of the city of *London*. *Same Stat. §. 18.*

What estates are
within the cus-
tom.

Estates of inheritance or freehold are not within the custom; but if a freeman of *London* has a mortgage in fee, this shall be counted part of his personal estate, and subject to the custom. *1 Ch. Ca. 285.* A lease for years waiting on the inheritance of a freeman of *London*, is not within the custom. *1 Ch. Ca. 285. 1 Vern. 2.* A freeman of *London* possessed of a lease worth 1500 *l.* bought the inheritance in the name of trustees for 150 *l.* though there was no declaration that the lease should attend the inheritance; and though the lease would be assets at law to pay debts, it was held not to be subject to the custom of *London*. *Dowse and Derivall, Vern. 104. 2 Ch. Rep. 243. 2 Ch. Ca. 160.* If a freeman of *London* be made both executor and residuary legatee, and dies before he has made his election whether he will take as executor or residuary legatee, yet he shall be supposed to take as the latter, and the residuum shall be subject to the custom. *1 Ch. Ca. 310.*

Thomas

Thomas Frederick, Esq; son of *Sir John Frederick*, Knt. late lord mayor of *London*, in *January 1674*. applied to marry the plaintiff *Leonora*, one of the daughters of *Charles Maresco*, who was an orphan of the city of *London*, (being daughter of a freeman,) and the marriage being agreed upon between the relations on both sides, *Sir John Frederick*, by indentures of lease and release, settled divers houses, of 330*l.* per Annum, to the use of *Thomas* (his son) for life, remainder to the plaintiff *Leonora*, (the intended wife) for her life, remainder to the first, &c. son of the marriage in tail male, remainder to trustees for 1000 years for daughters portions, if no issue male; And by another deed of the same date, the sum of 6500*l.* which was *Sir John Frederick's* money, and also 600*l.* computed the residue of the plaintiff *Leonora's* portion, (beyond 5000*l.* which *Mr. Frederick* the husband was to receive) was assigned over in trust to be laid out in a purchase, and to be settled on *Mr. Frederick* the then intended husband for his life, remainder to the plaintiff *Leonora* the intended wife, for her life, remainder to the first, &c. son of the marriage. Afterwards and before the marriage, the plaintiff *Leonora* being an orphan, and consequently the licence of the court of aldermen (who are guardians of the city orphans) being necessary to the marriage, to avoid being liable to a commitment, application was made to the court of aldermen for their consent; whereupon an entry was made at the special court held 15 *February 1674*. No. 22. "That at this court licence is granted to *Leonora Maresco*, one of the daughters and orphans of *Charles Maresco*, late citizen and — of *London*, deceased, to marry *Thomas Frederick*, Esq; son and heir apparent of *Sir John Frederick*, knight and alderman, provided that *Mr. common serjeant* do approve of the settlement made upon the said orphan, and signify the same to the court." And the said *Sir John* did there promise and engage, that if

One for valuable consideration contracts to be a freeman of *London*, but dies before he has taken up his freedom, his personal estate shall be distributed as if he had been a freeman, but his children shall not be orphans.

the settlement should not prove satisfactory to the common serjeant and to the court, that he would make up and enlarge the same to the satisfaction of the court; and the said Mr. Frederick being thereunto required, did promise and engage, and the said Sir John did also undertake, on his behalf, to take up the freedom of the city within one year next ensuing. N^o 22. At the same court it was agreed, "That when any person not free of the city should address himself to the court for a licence to marry any orphan of the city, that he should be first required and urged by the court to take up his freedom before the court would give consent for such marriage." N^o 23. At the humble desire of Mr. Thomas Frederick, son of Sir John Frederick, being capable of freedom by patrimony, desiring to be admitted by redemption into the company of —, it is ordered by the court, "That he shall be admitted to the freedom of the city by redemption in the said company of —, he paying to Mr. chamberlain, for the city's use, 3s. 4d." Mr. Frederick performed no part of the agreement, either in taking up his freedom, or in laying out the trust-money in a purchase. Mr. Frederick had two sons and three daughters, and by his will dated the 20th of May 1718. gave to his eldest son John 1000*l.* to his second son Thomas 1000*l.* to his daughters 1000*l.* and to his wife 10*l.* and devised such part of his real estate as was unsettled, to his second son Thomas in tail, but gave the bulk of his estate to his three grandsons, being the children of his second son Thomas; after which the testator died. His widow brought a bill, insisting, that he having made the agreement, *ut supra*, for a valuable consideration, *viz.* that of marriage, and to induce the court of aldermen to consent to his marrying their orphan, he ought to be taken as a freeman, and in consequence thereof his personal estate to be distributed as such, *viz.* the widow to have

have one third, his children another third, and only the remaining third to pass by the will. The lord chancellor decreed the personal estate of Mr. *Frederick* to be liable to the custom, and that he should be taken as a freeman of *London*, he having for a valuable consideration agreed to become such, and his personal estate distributed accordingly, viz. one third to the wife, another third to the children, and the will to operate only as to the deadman's part; the wife to have the benefit of her chamber and *paraphernalia*, but the legacies given by the will to the children, to be void, they not being given out of the deadman's part, but out of the whole personal estate, and so to be void, unless the children release their right to the rest of the estate, and abide by the will. *Trin. 1721. Frederick versus Frederick, Wil. Rep. 710. Stra. 455.* This decree was afterwards affirmed in the house of lords, with 200*l.* costs.

A. who was a freeman of *London*, purchased an estate in the names of *Edward Ambrose* (an attorney at law) and one *Hales*, who was *Ambrose's* clerk, and in the conveyance the consideration-money was mentioned to be paid by *Ambrose*. There was proof that *A.* declared he would buy the estate in the name of *Ambrose*, and that he desired to conceal it from being known to be his purchase, and that the whole purchase-money was the proper money of *A.* On the other side it appeared that *Ambrose* kept the deeds, and received the rents, and that *A.* by a paper of his own writing, purporting to be an estimate of what he is worth, had charged *Ambrose* as debtor for the money lent him to buy the estate, and also for the interest of that money. But that *A.* dying, and leaving a widow and three daughters, and *Ambrose* appearing to be insolvent, a declaration of trust was procured from *Ambrose*, (for which about 300*l.* was paid) purporting that the purchase-money was the proper money of *A.* and that the purchase

A. a freeman of *London* purchases in the name of *B.* but no trust declared till after the death of *A.* this is good against the custom.

Evidence of a trust where an estate is purchased in another's name.

purchase was made in the name of *Ambrose* in trust for *A.* A bill was brought by the daughters and coheirs for an account of the rents and profits of this estate; the widow insisted, that this purchase not being intended, much less completed in *A.*'s life-time, and the declaration being only advised as the most effectual way to secure the debt upon *A.*'s death, the same ought to be looked upon as in the nature of a personal estate, and consequently that a right vested in her by the custom of *London* to a share in this money in the hands of *Ambrose*, which could not be altered by the subsequent declaration of trust. *Lord Chancellor:* Had it not been for the statute of frauds, this would have been a resulting trust, and the declaration of trust executed by *Ambrose* after the death of *A.* has plainly taken it out of that statute: As to the declaration of trust prejudicing the widow, who was a third person, the declaration was evidence of the trust, and all evidence must affect a third person; if *Ambrose*, after the death of *A.* being examined as a witness, had declared on oath that he was but a trustee for *A.* this would have barred the widow; and decreed accordingly, but recommended it to the heirs, that they would agree to let the widow come in for her dower of this estate. *Trin.* 1716. *Ambrose* and *Ambrose*, affirmed in the house of lords June 1717. *Wil. Rep.* 321. 2 *Eq. Cas. Abr.* 267. pl. 17. 375. pl. 5. *Prec. in Chanc.* 537. See *Vern.* 88. 2 *Lev.* 32. *Vent.* 178. 3 *Wil. Rep.* 188. *Mod.* 77.

A mortgage shall be paid out of the personal estate in preference to the customary or orphanage part by the custom of *London*, because the custom of *London* cannot take place till after the debts paid. 2 *Wil. Rep.* 335.

Of fraudulent assignments, &c. made by freemen to elude the custom. A freeman of *London*, lessee for years, voluntarily assigns the term as a provision for his child, the widow shall have her customary share therein. 2 *Lev.* 130. and see *Ch. Rep.* 84. and 2 *Vern.* 84.

685. *sed vide* 2 Vern. 277, 612. A freeman of London having three bastards by T. J. confesses a judgment to her in 1000*l.* defeazanced for payment of 500*l.* in three months after his death. It was held, that this judgment, being voluntary, should not prevail against debts by simple contract, nor against the widow of the freeman, but that she should have her share, according to the custom of the city, without any regard to this judgment, but the debts being paid, the judgment should bind the legatory part. *Fairbeard v. Bowers*, 2 Vern. 202. *Prec. Ch.* 17. A freeman of London, on his son's marriage, gave 4000*l.* to be laid out in the purchase of lands to be settled on the son and the intended wife for their lives, with remainders in tail: Lands were purchased and settled accordingly, in the freeman's life-time. It was held, that this money should not be reckoned as any part of the freeman's estate, and that the son should not be obliged to bring it into *Hotchpot* to intitle him to a share of the personal estate. *Anaud and Honeywood*, Vern. 345. *Ch. Rep.* 179. 2 *Ch. Ca.* 117. 129. A freeman of London, who was a widower, had several children, and was possessed of a considerable leasehold estate; on a second marriage, in consideration of 2000*l.* portion, conveys the leases in trust for himself for life, remainder to his wife for life in lieu and bar of dower, all customary estate, &c. remainder to the issue of that marriage; and in the settlement there was an agreement, that the trustees should sell the leases, and with the money purchase lands of inheritance to be settled to the uses aforesaid, but the husband died before the settlement was made. It was held, 1. That the wife was barred from claiming any part of the personal estate. 2. That the children by the former marriage had no right to the leases, and that the settlement would not bar the children of the last marriage from coming in for a share of the rest of the personal estate; for by agreement the

the leases are to be considered as if a purchase had been actually made, and the freeman had paid the money out of his pocket. *Hancock v. Hancock*, 2 Vern. 665, 605.

What children are intitled to the benefit of the custom of London.

If an heir or co-heir of a freeman of London has a real estate settled on him by his father, he shall, notwithstanding, come in for his share of the personal estate according to the custom of the city. *Civil and Rich*, Vern. 216. 2 Jon. 204. 2 Vern. 82. The children of a freeman of London are intitled to their share of his personal estate though they were born out of the city, *Vent*. 180. *Mod*. 80. and though their father did not inhabit or die in London. *Roll. Rep*. 316. *Sid*. 250. *Vent*. 180. *Mod*. 80. 2 Vern. 48, 82, 110. Grandchildren of a freeman are not intitled to the benefit of the the custom of London. *Fowke and Hunt*, Vern. 397. Where the grandchild's father was never advanced in the freeman's life-time, and died before the freeman, leaving a child; and only the freeman's children are within the custom to come in for an orphanage part. *Wil. Rep*. 341. *Salk*. 426. Vern. 397. An after-born child is within the custom. *Walsam, and Skinner*, Rep. Eq. 153. *Prec. Ch*. 499.

A freeman's child, married by his consent, and not fully advanced, is debarred from any further share of the customary part.

Except the father, by some writing, declare the value of such advancement.

If any freeman's child, male or female, be married in the life-time of his or her father, by his consent, and not fully advanced to his or her full part or portion of his or her father's personal or customary estate as he shall be worth at the time of his decease; then every such freeman's child so married as aforesaid, shall be excluded and debarred from having any farther part or portion of his or her said father's personal or customary estate to be had at the time of his decease; except such father, by his last will and testament, or some other writing by him written and signed with his name or mark, shall declare or express the value of such advancement; and then every such child, after the decease of his or her said father, producing such will or other

other writing, and bringing such portion so had of his or her father, or the value thereof, into Hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate his or her said father had at the time of his decease, notwithstanding such father shall by any writing under his hand and seal declare such child was by him fully advanced. *Trin. 1699. Chace and Box.* Then on bringing the portion received into Hotchpot, shall receive a full child's part. Though the father should by writing declare such child fully advanced.

A freeman having advanced his daughter with a portion, and intending to exclude her from any further share (on some displeasure taken against her) made his will, and thereby reciting that he had advanced her 300*l.* and upwards, gave her 5*s.* and no more, and died. It was decreed, that she should have the 300*l.* made up a full child's share of the customary estate; for the words *and upwards*, are *certum in incerto*, and not to be regarded; though it was objected, it might be 1000*l.* or 2000*l.* or any other sum above 300*l.* *Hil. 1704. Bright and Smith.* Will declaring that he had advanced his daughter with 300*l.* and upwards, yet she shall have a full share.

Any provision made by the father in his life-time for his children, is advancement within the custom. *1 Vern. 89, 61, 216.* But a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot. *1 Ch. Ca. 160.* Neither does a devise of a real estate bar the child of its customary part of the personal estate. *2 Vern. 753.* What shall be an advancement.

If the portion of a child in part advanced, be brought into hotchpot, it shall be brought into the orphanage part only, and not into the whole estate, to increase either the widow's third, or the testamentary part. *Beckford v. Beckford, Vern. 345. 2 Vern. 281. 2 Ch. Ca. 119. 2 Ch. Rep. 359.* And therefore where an only child is in part advanced by the father in his life-time, such child shall not bring his part into hotchpot, there being none in equal degree with him. *Fane and Bence, 2 Vern. 234. Dean and Lord Delawar. 2 Vern. 628, 754.* The bringing into hotchpot is only for the benefit of the children, and not to increase the widow's third or testamentary part.

A freeman of London having but one child, advances that child in marriage in his life-time : his son died, leaving sons ; all his daughters died also in his life-time, except his eldest daughter *Hannah*, whom the father advanced in marriage about forty years before his death ; but the certainty of the portion did not appear under the father's hand, who by his will taking notice that he had advanced this only daughter in marriage, gave to her 35*l.* provided that if she or her husband should refuse to give a release to his executors after his death, or should any ways trouble them upon any claim by virtue of the custom of *London*, that the legacy of 35*l.* should go over to the children of his youngest deceased daughter, and gave the bulk of his personal estate (being leasehold) to his two grandsons the sons of his deceased son, and died leaving a wife and one only surviving daughter.

Salk. 426.
2 Vern. 234.
629, 754.

Anthony Cleaver, a freeman of *London*, had a son and three daughters, and advanced all his children in marriage in his life-time : his son died, leaving sons ; all his daughters died also in his life-time, except his eldest daughter *Hannah*, whom the father advanced in marriage about forty years before his death ; but the certainty of the portion did not appear under the father's hand, who by his will taking notice that he had advanced this only daughter in marriage, gave to her 35*l.* provided that if she or her husband should refuse to give a release to his executors after his death, or should any ways trouble them upon any claim by virtue of the custom of *London*, that the legacy of 35*l.* should go over to the children of his youngest deceased daughter, and gave the bulk of his personal estate (being leasehold) to his two grandsons the sons of his deceased son, and died leaving a wife and one only surviving daughter.

Adjudged 1st, That if the daughter had been only advanced in part, she should still have come in for her full orphanage ; for that the child's bringing her partial advancement into hotchpot, is only in order to make an equality among the children, and not for the benefit of the mother, or to increase the deadman's part.

If a child be fully advanced, it is the same as if there was no child.

2dly, That if a freeman having several children, or one child, does fully advance all his children, or his single child, this satisfies the custom, and is the same as if the testator had no child ; or if the husband, being a freeman, before marriage compounds with his intended wife as to her customary part, it is the same as if there was no wife.

If a child be advanced, and the certainty thereof does not appear under the freeman's hand, it shall be taken as full advancement.

3dly, That if the freeman shall have advanced his child in marriage, and the certainty of that advancement does not appear under the freeman's hand, this must be intended and taken to be a full and compleat advancement ; and his honour said, that the advancement in the present case being made about 40 years before the death of the freeman,

man, this declaration in the will that the daughter was fully advanced, was an evidence thereof, especially it being so difficult a thing for the legatees in the freeman's will to prove an advancement made at that great distance of time; but it being objected, that the father's own declaration in the will was of very little avail, since at that rate it would be in the power of every freeman, by making such declaration, to bar his child of the orphanage part: Thereupon proof was read, that the daughter's husband had himself confessed that he had received above 1000*l.* portion with his wife from the freeman at his marriage; which was satisfactory. It was also held, that the daughter, tho' a feme covert, had forfeited her legacy of 35*l.* by claiming her orphanage part. *Trin.* 1729. *Cleaver* versus *Spurling*, 2 *Wil. Rep.* 526. *Mos.* 179. 2 *Eq. Cas. Abr.* 270. pl. 29, 30, 31.

Edward Belitha, who was a freeman of *London*, had two daughters *Hannah* and *Elizabeth*, and one son the defendant *William*: The plaintiff *Cox* married the eldest daughter *Hannah* without the consent of her father; however, after the marriage, the father gave a portion to his said daughter of 4000*l.* 1400*l.* in money, and the rest in a leasehold and freehold estate, which was settled by the consent of the husband, for the separate use of the wife, and afterwards to her children; and thereupon the plaintiff *Cox* the husband released to the father "all his right and interest which he had, or might have, to any part of his personal estate by virtue of the custom of the city of *London* or otherwise, except such part as his father-in-law should give to him or his wife by will or otherwise," and covenanted to do any further act for releasing of any right, which he might have by the custom of *London*, to the executors or administrators of the said *Edward Belitha*." On a cross bill the court decreed a specific performance of this covenant.

Salk. 426.
1 Vern. 216.
2 Vern. 630.
1 Williams 642,
643.

If the husband of the child of a freeman, on receiving a suitable portion, covenants with the freeman to release to his executors after his death, equity will execute the covenant.

2dly,

2dly, The court held, that where a daughter was advanced in part, and the freeman the father had settled some leasehold estate to the separate use of the daughter, this ought to be brought into hotchpot, it being in the strictest sense an advancement of the child *pro tanto*.

Where lands of inheritance shall be an advancement.

3dly, It was held, that any land of inheritance, settled by the freeman upon his children, is not to be called an advancement either in part or in the whole, within the custom of *London*, in regard lands of inheritance are not within custom which affects only the personal estates of the freeman; *secus* of a lease for years; but if lands of inheritance be given to a child by a freeman in bar of the orphanage part, and accepted as such, it will be binding, or at least the child cannot have both. *Pasch. 1725. Cox versus Belitha, 2 Wil. Rep. 272. 2 Eq. Cas. Abr. 269. pl. 22, 23. 270. pl. 26.*

Of survivorship in the orphanage part.

If a freeman of *London* dies leaving two daughters, and one of them dies though after a division and partition of the whole personal estate, yet the surviving daughter shall have the whole orphanage part. *Trin. 1713. Leoffes versus Lewen, Rep. Eq. 32. Prec. Ch. 370.* If a child intitled to an orphanage part dies before twenty-one, and unmarried, her share shall survive to the rest of the children, though she makes a will and devises it away at seventeen years of age. *2 Vern. 559.* If a man marries an orphan who dies under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. *Fouke and Lewen, 1 Vern. 88.* If a man marries a city orphan, and her portion be in the chamber of *London*, and he dies before her age of twenty-one, it shall not be looked upon as a *depositum* for the husband, but as a *debitum* or *chose in action*, which he not having taken out, or reduced into possession, must survive to the wife. *Anne Pheasant's case, 2 Vern. 340. Ch. Ca. 181. 3 Ch. Rep. 69.*

If the daughter of a freeman of London marries against his consent, unless he be reconciled to her before his death, she shall not have her orphanage part of his personal estate. *Foden and Howlet, 1 Vern. 354.*

Orphanage part forfeited by marrying against the father's consent.

If a freeman of London dies intestate, leaving a wife and children, the widow shall have her chamber, and one third of his personal estate, the children shall have one other third part, and the remaining third must go according to the statute of distribution, 22, 23 *Ca. 2. c. 10. viz.* two thirds to the children, and the other third to the wife. *Walsam and Skinner. Rep. Eq. 153. Ch. 499. 2 Vern. 559.* that is, the children five ninths, and the widow four ninths besides her chamber.

How the estate of a freeman dying intestate, and leaving a wife and children, shall be divided.

A freeman of London had no wife, but had issue *A.* a son, and *B.* and *C.* daughters; *C.* married against his consent, for which reason she never had any portion; afterwards she died in her father's life-time, leaving a son *D.* The freeman by his will taking notice that he had given to his son *A.* 400 *l.* and to his daughter *B.* 1000 *l.* in full of their orphanage part, devises 500 *l.* to his grandson *D.* and after some other legacies, gives one moiety of his personal estate to his son *A.* the other moiety to his children and grandchildren: The freeman afterwards gives several further sums at several times to his son, amounting to 600 *l.* the certainty whereof only appears by the son's answer, and then dies leaving his daughter *B.* *ensient* with a child which was afterwards born.

1. Admitted by counsel, and decreed, that there being no wife of the freeman, the children were intitled to one moiety, the other moiety being the deadman's part.

Where no wife, the children intitled to one moiety.

Salk. 126.

2. Admitted by counsel, and said to have been settled, that a freeman's grandchild (where the grandchild's father was never advanced in the freeman's life-time, and died before the freeman, leaving a child) was not within the custom, and that

2 Vern. 612. Grandchild not within the custom.

Salk. 416.

1 Vern. 397.

P

only

only the freemen's children were within the custom to come in for an orphanage part.

Sen advanced, the certainty of one part appears in the freeman's will, and of the other part (being subsequent) by the son's answer, shall not bar him of his orphanage part. 2 Vern. 630.

3. Decreed, that whereas the son was by the will mentioned to have had 400 *l.* and consequently the quantum of his advancement appeared under the freeman's hand, yet this very declaration by the custom let the son in for his orphanage part; and though the son afterwards received further sums, amounting to 600 *l.* the certainty whereof appeared by his own answer, yet these sums which were additional advancements, being with the other 400 *l.* brought into hotchpot, would not be a bar to his orphanage part. *Hil.* 1716. *Northey versus Strange*, *Wil. Rep.* 340. *Prec. in Chan.* 470. 2 *Eq. Cas. Abr.* 264. *pl.* 8, 9.

The widow of a freeman dying intestate and without issue, shall have her widow's chamber, and one moiety of the personal estate by the custom, and a moiety of the other moiety by the statute.

If a freeman of *London* dies without issue, his widow shall have her widow's chamber, and a moiety of the rest of the personal estate, and as to the other moiety, she may plead herself administratrix to her husband, and a proviso in the statute of distribution (22, 23 *Car.* 2. *c.* 10. §. 4.) that it should not prejudice the custom of *London*, and the plea shall be allowed. *Hil.* 1682. *Mathews and Newby*, *Vern.* 132. *sed nota*, this proviso extends only to the customary share, and not to the deadman's part, for that must be distributed according to the *aforesaid* statute; and in this case one moiety of the deadman's part belongs to the wife; so that she will have three fourths of the whole personal estate besides her widow's chamber.

A freeman having no children devises to his wife the yearly profits of his personal estate, she shall have her widow's chamber, and one moiety by the custom, and the benefit of the other moiety by the will.

A freeman of *London* having no children, by will devised a chattel lease to one, all his books to another, and several other particular legacies; the use of his plate, &c. to his wife for life; and as to all the rest of his estate, consisting in money, goods, mortgages, and credits, he gave the yearly profits thereof to his wife for life, and devised it over after her death. It was decreed, that by the custom of *London* the widow should have her chamber, and one entire moiety of the personal estate

after

after debts paid, as well of the lease and books, which were specifically devised away, as of the residue of his estate, and should have the benefit of the other moiety for life by the will. *Webb and Webb, 2 Vern. 110.*

In the case of *Atkins and Waterston, Rep. Eq. 94.* the custom was certified to be, that where a freeman before marriage makes a settlement on his intended wife, and the same is thereby declared to be in full lieu and bar of her share of his personal estate, that she is thereby barred to claim any of his personal estate after his death: And in the case of *Lewin and Lewin, Cases in Ch. 14.* See *3 Wil. Rep. 15. pl. 5. Eq. Cas. Abr. 159.* that if a woman before her marriage with a freeman accepts a settlement out of his personal estate, without any notice taken of the custom, this bars her of any customary share of his personal estate if she survives him. On a treaty of marriage between a freeman of London and widow who had a considerable fortune and several children, it was agreed that he should have only 600 *l.* of her fortune, and that the residue should be settled on her and her children, which was accordingly done, and he in consideration of the intended marriage and 600 *l.* portion, makes a settlement on her, and at the end of the deed covenants, that if she survived him, his executors should pay her 600 *l.* The marriage took effect, and the husband died; the widow insisted to have the 600 *l.* pursuant to the agreement, and a full moiety of the personal estate by the custom; but it was held that the agreement mentioning the husband to be a citizen of London, shewed that the custom might be then well in view, and that this compounding for 600 *l.* in all events exempted her out of the reason of the custom. *Hil. 1711. Whitbill and Phelps, Rep. Eq. 81. Prec. Ch. 325. vide ante fo. 204.* the case of *Hancock v. Hancock, 2 Vern. 665.* A widower, freeman of London, and a widow being about to

Where by a settlement before marriage the widow shall be barred of her customary share.

marry, and having only personal estates, by articles before marriage agreed, that in case he survived he should have only 2000*l.* out of her personal estate, and the rest to be at her disposal; and in case she survived, she to have 2000*l.* out of his personal estate, without saying *only*, or *no more*; the husband died; it was decreed, that the widow should have only the 2000*l.* and no further share of the personal estate. *Mich. 1714. Pott v. Lee.* If a freeman settles a jointure on his wife in bar of dower, this shall not exclude her from her customary part of his personal estate. *Atkins and Waterston, Rep. Eq. 94.*

A jointure in bar of dower will not exclude of her customary part of the personal estate.

A jointure by a freeman on his wife in bar of dower, will not bar her of her customary part; secus said to be in bar of her customary part.

A freeman of London on his marriage covenanted to add 1500*l.* to the wife's portion, which was 1500*l.* to be laid out in the purchase of lands to be settled on the husband for life, then to the wife for her life, for her jointure, and *in bar of her dower*, with remainder to the children of the marriage: The freeman by will (*inter alia*) gives a legacy to his wife and dies, leaving a wife and children. *Lord Chancellor*: A jointure of land made by a freeman upon his wife, if expressed to be in bar of her customary part, would be so; but if not so expressed, and only said to be in bar of her dower, this would be no bar of her customary part, because a real estate is of a quite different nature from a personal estate, and a matter wholly out of the custom; and it was the same thing in the principal case, where the freeman had covenanted to lay out of his own estate 1500*l.* in a purchase and to settle as above. 1. Because, from that time the 1500*l.* was not his own estate, nor what the custom of London could meddle with. 2. For that money covenanted to be laid out in land, is, as to all respects, land in equity, and was not within the custom. A freeman may in his last sickness invest his personal estate in land, which would defeat the custom even though he should say at that time that he did

Where a freeman leaves his wife a legacy, and the testamentary part is sufficient, she

did it on purpose to defeat the custom : As to the legacy given to the wife, it appearing the legacies did not exceed the testamentary part, it was the same thing as if those legacies had been expressly given out of the testamentary part, and therefore the legacy being no ways inconsistent with the custom, the wife might in such case take both. When the testamentary part will not pay all legacies, the wife, if she be a legatee, shall not take her legacy and her customary part also. A devise of a real estate by a freeman to his wife, shall not bar her of her customary part, or prevent her from taking both, unless it be so expressed in the will ; because the devise of the real estate to the wife, no ways lessened the customary part. *Hil. 1718. Babington versus Greenwood, Wil. Rep.*

530. *Prec. Chan. 505.*

Mr. *Hebbert*, a freeman of *London*, having issue by his first wife one daughter the defendant Mrs. *Barker*, married a second wife the defendant *Hester*, and before marriage articted to settle land upon her, and to leave her 400 *l.* in money. The wife, before marriage entered into a bond to a trustee, in the penalty of 3000 *l.* if she survived the husband, to release to his heirs, executors, &c. on receipt of the 400 *l.* her right to his real and personal estate by virtue of the custom of *London*. Mr. *Hebbert* had issue by his second wife one daughter, the plaintiff *Hester Blunden* : After this, advancing his eldest daughter in marriage, by the marriage writings 4000 *l.* was declared to be towards her portion, and some freehold together with some leasehold estates were settled upon Mr. *Hebbert* for life, remainder to Mr. *Barker* the husband, his heirs, executors, &c. and this marriage writing (amongst others) was signed and sealed by Mr. *Hebbert* himself, who being indebted to his daughter *Barker* for monies and rents received by him during her infancy, (and which had become due from estates given her by her

On a freeman's widow's customary part being barred by composition who shall have the benefit of it, the husband or children ? Also whether a child's orphanage part be barrable by release or covenant.

aunt and other relations) Mrs. *Barker*, before marriage, executed a release to her father of all rights, claims and demands which she had or might have by the custom of *London*, saving to herself whatsoever her father should voluntarily give her. Some time after Mr. *Hebbert* made his will, whereby taking notice that his second daughter had married against his consent, he gave a considerable estate to his wife, and about the value of 1000 *l.* in land and money to his second daughter, and after several legacies, bequeathed the surplus to his daughter *Barker*, and died. The plaintiffs, *Blunden* and his wife, brought their bill for an account of the personal estate of Mr. *Hebbert*, insisting first, that by the bond which had extinguished the widow's right by the custom, she was thereby compounded with, and to be taken as dead, consequently that the children of the freeman were to have one half of the personal estate, and the remaining half to be the testamentary part. 2. That Mrs. *Barker* ought to be barred from taking any part by the custom; and this as well in respect to the release which she had given to her father, as also for that it did not appear what was the value, and certainty of the portion Mr. *Hebbert* had given her; and therefore that Mrs. *Blunden* was intitled to a moiety of the whole personal estate of the testator, viz. all the orphanage part. On an appeal from a decree of the master of the rolls, the lord chancellor declared, that he took this to be an absolute agreement that the defendant *Hester* should perform the condition of the bond, which was, that after her husband's death she should release to his executors*, and

* Note in the case of *Green v. Green*, which was heard at the Rolls, Hil. 1718. Mr. Vernon observed, that on this point precedents had been both ways, though the most solemn ones were against the children's having the benefit of the composition made with the wife, to which the court inclined, without then determining it: But

that the agreement was not that her third part should be absorbed for the benefit of her children, but should go to his executors for the benefit of his will; that his lordship would look into precedents, and see whether they come up to the present case, and whether the custom of the city of *London* had been certified as to the question. As to the orphanage part, his lordship declared that the testator had a power to release the agreement made with the defendant *Frances Barker* before her marriage, and that he had released the same by his will by giving her the remainder of his real and personal estate; that one third of the personal estate; (in case the defendant *Hester Hebbert* should be barred thereof) would not fall in to be absorbed or extinguished in the orphanage part, but would fall in to the testamentary part, and that the plaintiff *Hester* would be intitled to no more than a moiety of one third of her father's personal estate, the defendant *Frances Barker* bringing the leasehold houses, and the 4000 *l.* given her upon her marriage into hotchpot, &c. *Pasch.* 1720. *Blundon v. Barker*, *Wil. Rep.* 634. 10 *Mod.* 451, 462.

Note; the parties afterwards came to an agreement.

If a freeman of *London* by will devises to a child a legacy exceeding what his orphanage part will amount unto, without taking any notice of the custom, the legacy shall be a satisfaction, for the child shall not take both by the will and custom:

Where a legacy to a child shall be a satisfaction of the orphanage part.

afterwards in the case of *Pusey and Desboverie*, 3 *Wil. Rep.* 315. pl. 82. *Cas. Temp. Talb.* 130. heard July 1734. Lord chancellor Talbot taking notice of the contrary determinations made by the court in this point, said it had of late been settled, that where the wife is compounded withall, it should be taken as if there was no wife, and consequently that the husband should have one moiety and the children the other. The like was held by the lord Hardwicke in the cases of *Medcalf versus Ives*, *Ark. Rep.* 63. pl. 21. and *Morice versus Burrow*, heard 18 June and 3 February 1737. *Ark. Rep.* 399. pl. 181. *Wil. Rep.* 644. cites *S. P. decreed*; so does 1 *Mod.* 455. 2 *Wil. Rep.* 57. See *Moseley* 18.

but if the legacy is less than the orphanage share, it seems according to the opinion in like cases, that the child shall have both the legacy and his orphanage part, especially if none of the devises in the will are disappointed.

A freeman having power to dispose of two thirds of his personal estate, the whole being 1800*l.* devised two parts of the whole to his two daughters, and the remaining third to his two sons, each daughter shall have 600*l.*

A freeman of *London* having two sons and two daughters, and being possessed of a personal estate of 18000*l.* and having compounded with his wife, so that he had a power of disposing of two thirds of his personal estate, by will devised two thirds of his whole estate, to his daughters, and one third to his sons: The chamber of *London* would have distributed in this manner, viz. 6000*l.* the customary part, amongst all the four children, and two thirds of the residue to the daughters, and one third to the sons; so that thereby each daughter would have 5500*l.* and each son 3500*l.* But in chancery it was decreed, that the daughters should have two intire thirds of the whole estate, which was 6000*l.* a-piece. *Love v. ———, Vern. 6.*

Freeman devising more than the legatory part, legatees to abate.

If a freeman of *London* devises legacies which exceed the value of the legatory part, the legatees shall abate in proportion. *2 Vern. 111, 754.*

Deadman's part not subject to the custom.

If a freeman of *London* dies intestate, the deadman's part of the personal estate is not at all under the controul of the custom of *London*, but subject to the statute of distribution. *22, 23 Car. 2. c. 10. Walsam and Skinner, Rep. Eq. 153. Prec. Ch. 499. 2 Vern. 599.*

Devise of 700*l.* for mourning, it must come out of the legatory part.

A freeman of *London* devised 700*l.* for mourning. *Per Curiam*, It must come out of the legatory part, and not lessen the orphanage or customary shares. *Deakins and Buckley, 2 Vern. 240.*

Freeman of *London* dying within the province of *York*, the custom of *London* shall govern.

If a freeman of the city of *London* dies within the province of *York*, seised and possessed of a real and personal estate; the custom of the city of *London* for the distribution of his personal estate, shall prevail and controul the custom of the province of *York*. *2 Vern. 48.*

Also

Also if a freeman of *London* die within the province of *York*, his heirs shall come in for a share of the personal estate, though by the custom of the province of *York* he is debarred from having any share of it; for the custom of the city of *London*, which follows the person, shall be preferred to that of the province of *York*, which is only local. *Cholmely and Cholmely*, 2 *Vern.* 82.

And his heirs shall have a share of the personal estate, though otherwise by the custom of *York*.

An inhabitant within the province of *York* on his marriage settled his lands on himself for life, remainder as to part on his intended wife for life, remainder as to the whole on his first and other sons in tail, remainder to his own right heirs. It was held, that the son was thereby excluded by the custom of the province of *York* from having any share of his father's personal estate. *Constable and Constable*, 2 *Vern.* 375.

In *York* a settlement on the son in tail, remainder in fee, debars him of the customary share of the personal estate.

A man who lived within the province of *York* died intestate, having advanced all his children in his life-time. It was held that his personal estate should be distributed according to the statute of distributions: 22, 23 *Car. 2. c. 10.* *Goodwin and Ramsden*, 1 *Vern.* 200.

An intestate in *York* having advanced his children, his estate subject to the statute.

An inhabitant within the province of *York* having a son and daughter, but no wife, having advanced the son by a settlement of lands, and given his daughter a portion in marriage, in lieu and full satisfaction of what she might claim by the custom of the province of *York*, died intestate: The question was, how the personal estate should be distributed? For the son it was insisted, that here the custom of the province of *York* was to be quite laid out of the case; the same distribution to be made of the estate as of other intestate's estates, and by consequence the daughter to bring her portion into hotchpot, but the son to have a full share without any regard to the lands that had been settled on him: But it was held, that the daughter should not bring back her portion into hotchpot, for it came in lieu of her customary

A daughter (of an intestate) who had received a portion in satisfaction of her share, by the custom of *York* shall not bring it into hotchpot.

customary part, and was the price the father thought fit to give her for the same. *Gudgeon and Ramsden, 2 Vern. 274.*

The widow of an intestate within the province of York, leaving no child, shall have one moiety, and the other shall be distributed according to the statute. *22, 23 Car. 2. c. 10. Stapleton and Sherrard, Vern. 465, 134, 305, 432. 2 Ch. Rep. 255.*

Of the certain or incertain description of a legacy.

Where money shall not pass by a devise of goods and chattels, &c.

A Man devised 1200*l.* to *J. S.* and by general words devised all his goods, chattels, and household-stuff in and about his house to the said *J. S.* money in the house will not pass, he having a particular legacy devised to him. *2 Ch. Rep. 190.* A man devised to his niece all his goods, chattels, household-stuff, furniture, and other things which then were, or should be in his house at the time of his death; and sometime after died, leaving about 265*l.* in ready money in the house. It was held, that this ready money did not pass, for by the words *other things*, shall be intended things of like nature and species with those above mentioned. *Mich. 1729. Trafford and Beridge.*

By what words plate and jewels will not pass.

Plate and jewels will not pass by a devise of utensils. *Dyer 59.* But by a devise of household goods plate will pass. *2 Vern. 638.* Whether plate shall pass by a devise of furniture, vide *2 Vern. 585. Prec. Ch. 251.* The earl of Northumberland by will devised his jewels to his wife, and died possessed of a collar of SS. and of a garter of gold, and of a buckle annexed to his bonnet, and also of many other buttons of gold and preci-

ous stones annexed to his robes, and of many other chains, bracelets, and rings of gold, and precious stones. It was held that the garter and collar of SS. did not pass, because they were not properly jewels, but ensigns of honour and state, and that the buttons in his bonnet and buckles did not pass, because they were annexed to his robes, and were therefore no jewels; but for all the other chains, rings, bracelets and jewels, they passed by virtue of the will. *Owen* 121. 2 D.

525. p. 6. Lessee for 99 years bequeathed several legacies of plate and other goods to diverse persons, and then bequeathed all the residue of his goods, his debts and legacies being paid, to his wife, and made her sole executrix. It was held, that the lease passed to her as legatee, for though by a grant of *omnia bona* a lease will not pass; yet by the civil law *bona* includes all chattels, and this being a legacy the judges of the common law ought to be guided therein by the civil law. *Portman v. Willis*, *Cro. Eliz.* 386. *Moor* 352. *Goldf.* 129. 2 D. A. 525. p. 7. By a bequest of the moiety of the personal estate, where the testator had money, bonds, and a lease for years, a moiety of the lease will pass. *Lee* against *Hale*, *Ch. Ca.* 16.

A man who had skill in pictures and frequently bought pictures and sold them again, and had pictures in boxes as well as some hung up in his house, and likewise pictures at his death which he had not at the time of making his will, devised his house, and all his goods and furniture therein, to his wife for life, and after her decease to his son R. and his heirs, except his pictures which he gives to his sons A. and B. It was held, that the sons A. and B. should have as well the pictures hung up in the house as furniture, as those in boxes, and as well those in the house at the time

about to devise A
should like W. re
a picture of the re
apportion, as the
should like to the
being, it would to

By what words
a lease for years
will pass.

Devise of house
and all the goods
and furniture therein
except his pictures
which he gives to his
sons A. and B.

On a devise of
furniture, except
pictures, the ex-
ception shall go
to pictures in
boxes as well as
those hung up,
and to pictures
bought after the
will.

On a devise of
house, and all the
goods and furniture
therein, except his
pictures which he
gives to his sons
A. and B.

of the will as those bought after the will was made. *Gayre v. Gayre*, 2 Vern. 538.

A devise of goods at W. all there at the testator's death, though not at the time of the will, passes.

Aliter, if removed by testator's approbation.

Devise of arrears now due will not pass arrears incurred after the making the will.

Quantum of a legacy left to the executor's discretion.

A man devised to his wife all his personal estate at a place called W. It was held, that all his personal estate, as coaches, horses, &c. there at the time of his death, should pass, though not there at the making the will, the personal estate being fluctuating and varying until the time of the testator's death. *Sayer and Sayer*, 2 Vern. 688.

Rep. Eq. 87. *Proc. Ch.* 392. But where the testator devised to his wife all his household goods and furniture that should be in his house at R. at his death, and the goods there were after the will removed to another house by the testator's approbation; it was held that the legacy was void. *Earl and countess of Shaftsbury*, 2 Vern. 747.

Rep. Eq. 172. The testator devised to a charity all then due and unjustly detained from him by the dean and chapter of York. It was held, that though a general devise of all a man's goods will carry all that he had at his death, though purchased after the making the will, yet here the devise is confined to the arrears due at the time of making the will, and will not pass arrears incurred after. *Trin.* 1701. *Attorney General and Bury*.

A man devised lands for payment of his debts and legacies, and devised 400*l.* to two of his sisters, and to his third as much as his executor should think fit. It was decreed, that the third should have 400*l.* also, and be made equal to her other sisters if the estate would hold out. *Wareham and Brown*, 2 Vern. 153.

Of the description of the legatee.

A younger child who is heir, shall not take by a devise to younger children.

THE testator devises money to younger children; there are diverse daughters and a son, who by birth is a younger child, but is heir

heir at law to a fair inheritance. It was held, that he should not be considered as a younger child, so as to take by this devise. *Bretton and Bretton*, 3 *Ch. Rep.* 1. *Ch. Rep.* 224.

Lands were devised to be sold for the increase of children's portions. It was held, that a child, born after the will was made, should have a share. *2 Ch. Rep.* 211. Where a child born after the will shall take.

The testator devised 20 *l.* a-piece to all the children of his sister. It was held, that a child born after the making the will, and before the death of the testator, should take by virtue of the devise, the word *children* comprehending all. *Garbrand and Mayot*, 2 *Vern.* 105. *sed vide Dier* 177. *Inst.* 112. *b.*

If a man devises the surplus of his estate to his grandchildren living at his death; grandchildren born after his decease shall not take; for if he had intended it, he would not have restrained it to children living at his death. *Musgrave and Parry*, 2 *Vern.* 710. If limited to children living at testator's death, children born after shall not take.

The testator devised 1500 *l.* in trust for the children of *B.* and *B.* had only one child and several grandchildren, the child shall take the whole, and the grandchildren shall not come in for shares; but if *B.* had no child living, the grandchildren might have taken by the name of children. 2 *Vern.* 106. Where by a devise to children, grandchildren shall take.

The testator devised the residue of his personal estate to the children of *A.* and *B.* neither of them had a child either at the time of making the will or of the testator's death. It was held, that the devise was executory, and should extend to any children that *A.* and *B.* should afterwards have, and that the children of each should take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their parents. *Weld and Bradbury*, 2 *Vern.* 405, 705. Devise of personal estate to the children of *A.* and *B.* they having none either at the time of the will or death of the testator, after-born children shall take by executory devise, et per capita.

The testator devised all his goods in such a house to *G.* for life, and after his decease to the heir of *J. S.* and the question was, whether he that Goods devised to *G.* for life, and after his decease to the heir of *J.* that *S.*

that was heir to *J. S.* should take those goods as devisee, and the said goods go to his executors, although such heir die in the life-time of *G.* or whether he that was heir to *J. S.* at the time of *G.*'s death, should have them; and though it was urged, that these goods were only the furniture of the capital house, yet it was held, that they absolutely vested in him that was heir of *J. S.* at the time of his death. *Dancoers* and the earl of *Clarendon*, *Vern.* 35.

By a devise to
servants, who
shall take.

The duke of *Bolton* by will devised in this manner, *viz.* *Item*, I give and bequeath unto such of my servants as shall be living with me at the time of my death, one year's wages. It was held, that such servants only as lived in the testator's house, and had diet from him should take by this devise; and not stewards of courts, and such who were not obliged to spend their whole time with their master, but might also serve any other master. *2 Vern.* 546, 547.

Sir Robert Henley the father, devises 100*l.* a-piece to each of his servants, and lives above a year after, in which time several of his servants went away, and others were taken in their stead; but some of those who were his servants at the time of publishing the will, continued in their service till his death; and one that was his postilion at the time of the will, went away sick, and another was taken in his place, and he was not come back to his place at the time of the testator's death. Ruled by *Jefferys* lord chancellor, 1. That there being no new publication, those that become his servants after the publication of the will took nothing, though they were his servants at the time of his death. 2. Those that were his servants at the publishing the will, took nothing unless they continued with him at his decease. 3. The boy that went away sick, and was not turned away, shall take, for his sickness was the act of *God*: And being moved to hear

hear the civilians, or have precedents from the spiritual court; he refused; for the matter being before him, he was to follow his conscience and opinion, and they might observe their own rules in cases of legacies sued for before them. 4. None but menial servants take. Mr. Solicitor cited a case, the testator devised to his servants *A.* and *B.* and every other which should continue his servant at his decease; where it was held, that such as came in after the publication, were not intitled, nor *A.* and *B.* unless they continued. *Jovis 17 December 1685. Jones and others, against Sir Robert Henley.*

A. gives 700*l.* to the children of her daughter, and wills it to be paid, amongst them after the decease of her daughter, and that her daughter should have the interest during her life. The daughter has three children at the time of the decease of *A.* and has one child more after; one of the three children dies, and *J. S.* takes administration of his estate; the daughter dies. The lord chancellor held, 1. That the child born after the testatrix's death could have no benefit of the devise. 2. That this is a present devise *solvend' in futuro*, and the words *amongst them* apporions the thing, and the administrator of the dying child shall have a share, for it was a devise in common; and Sir *William Turner*, executor of the devisor, was decreed to pay the money. 11 October 1682. Sir *William Turner's* case.

Devise of 700*l.* to the children of *A.* to be paid after *A.*'s death, a child of *A.* born after the death of the devisor, shall not take.

The father devises 40*l.* to the wife of *John Hays* his son (who is then married to *Elizabeth*); if she survive her husband, and if he have no wife at the time of his death, then the 40*l.* should go to the children of *John*. The testator dies, the said *Elizabeth* dies, *John* marries *Anne* and dies, *Anne* sues for the legacy in chancery, and decreed; for the father's intent was construed to be, that the 40*l.* should be as something of a provision for such wife as

The administrator of a child of *A.* who died before *A.* shall have a share.

Legacy to the wife of *J.* (who was married) if she survived, and if *J.* dies without a wife, to his children; the wife dies, *A.* marries another and dies, the last wife shall take.

John

John should leave at the time of his death, and is not only appropriated to the person of the first wife, which was pretty evident from the last words, and if he have no wife living, &c. The lord keeper said, this was in imitation of their way of making jointures in the west country, where their surrenders are often to the husband for life, with remainder to her that shall be his wife at the time of his death. *Hil. 1684. 34. 35 Car. 2. Hone and Hone.*

Of lapsed legacies.

IF the legatee die before the legacy is due, the legacy is extinguished; but in order to know when a legacy is due we are to consider whether the legacy be *simple or conditional, or referred to a future day?*

When the legacy is simple, the day of the death of the testator is the day when the legacy begins to be due, therefore if the legatee dies before that day the legacy is void, and the executors or administrators of the legatee cannot recover the same; and so it is, if the devisee of a copyhold die before the devisor, notwithstanding the surrender by the devisor of the copyhold, to the use of his will. *Stra. 445.* and so also it is, if the legatee lives as long as the testator, but does not survive him, for they may both die at one instant, as in a storm at sea they may be both drowned together, or by the falling of a house may be both killed at once; but if the legatee overlive the testator, even though it be but for a moment, the legacy is due, and may be recovered by the executors or administrators of the legatee.

A. devises to his six relations *C. D. E. F. G. H.* all his lands, &c. and all his personal estate, in trust, to perform his will, and after all these things discharged, directed that the remainder should be equally

Plowd. 345
Swab. 35, 500.

What a lapsed
legacy.

equally divided amongst them, *share and share alike*, and made his said six relations executors. *C.* one of the legatees died, and then *A.* the testator died. *Quære*, whether the share of *C.* dying in the life-time of the testator should go to the surviving residuary legatees, as part of the *residuum*, or whether, in this case, it should go the next of kin of the testator, as so much of his estate undisposed of? Mr. Solicitor General argued, that where there is a lapsed legacy, it falls into the *residuum* of the personal estate generally; but here a part of the *residuum* itself is the lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator; for the executors are to take nothing as executors, but as residuary legatees; and *C.* dying in the life-time of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed. *Page v. Page*, 2 *Stra.* 820.

When the legacy is *conditional*, the legacy is not due until the condition be performed, and therefore if the legatee die before the condition is performed, the legacy is extinguished, except in some few cases.

But if a legacy be devised to a child payable at his age of twenty-one years, and if he dies before that age, then the legacy to go over to another; in this case, if the child dies before he attains the age of twenty-one, the second legatee shall have the legacy immediately. 2 *Vern.* 283. 2 *Will. Rep.* 478. 8 *Vin. Abr.* 404. pl. 35. 2 *Burn's Eccl. Law* 575.

When the legacy is referred to a future day, we are to consider whether the day is intirely certain or intirely uncertain, or in some respects certain, and in other respects uncertain.

If the day is *certain*, the legacy begins to be due from the time of the death of the testator, although it be not payable until the day limited; and therefore in this case, if the legatee dies before the day appointed for payment of the legacy, his

Q

executors

executors or administrators may recover it : As if *A.* bequeath to *B.* 100 *l.* at *Christmas* 1743. and after dies, and after him *B.* dies but before *Christmas* 1743. the executors or administrators of *B.* at *Christmas* 1743. may demand and recover the legacy.

If the day is *utterly uncertain*, and the legatee dies in the mean time, the legacy is extinguished, and the executors or administrators of the legatee shall not have it : As if *A.* bequeath to *B.* 100 *l.* when he shall be married, or to be paid when he shall be married ; here the day is *intirely uncertain*, for it is neither certain *when B.* shall be married, nor *whether* he shall be married at all ; and if *B.* die before he is married, his executors or administrators shall not have the legacy ; neither is it material whether the day be joined to the *substance* of the legacy, or to the *payment* of it, as in the example above, for in either case the legacy is gone.

If the day be partly certain and partly uncertain, we are to consider if the uncertainty arises from the question, *whether* the day shall happen ? 2. Or the question *when* it shall happen ?

As to the question *whether* the day shall happen, which is thus : The testator bequeaths 100 *l.* when his son shall attain the age of twenty-one years, (for the time when he shall attain that age is certain, but whether he shall live so long is uncertain) we are to distinguish whether the day is joined to the *substance* of the legacy, or to the *payment*. If it be joined to the *substance* of the legacy, and the legatee dies before the day, the legacy is gone ; as if *A.* give *B.* 100 *l.* when he cometh to the age of twenty-one years, and *B.* dieth before, the legacy will not go to his executors or administrators, except in certain cases, as where the legacy is left to pious uses, or the time tendeth to the dissolution of the legacy, *e. g.* the testator gives you 10 *l.* yearly until his son attains the age of
twenty-

twenty-one; if the son dies in the mean time, you shall have the legacy of 10*l.* yearly until such time as the son should have attained that age if he had lived; and lastly, if it be the will and meaning of the testator, that the legacy should go to the executors or administrators of the legatee: But if the day be joined to the *payment* of the legacy, the executor or administrator of the legatee shall have the legacy though the legatee die before the day; as if *A.* bequeaths 100*l.* to *B.* and wills that it shall be paid to *B.* when he attains the age of twenty-one years; though *B.* dies before he attains the age of twenty-one years, yet his executors or administrators may recover the legacy when the time is expired that *B.* should have attained that age if he had lived.

As to the question *when* the day shall happen, as if *A.* bequeath to *B.* 100*l.* when the executor of *A.* shall die, or to be paid when the executor of *A.* shall die; here, though it is certain that he must die, (we must all die) but the day *when* he shall die is uncertain, if *B.* die before the executor of *A.* the legacy is extinguished: But if this legacy after another's death be duly considered; it is not only uncertain as to the time *when*, but is also uncertain *whether* it ever shall happen, because it is uncertain whether the legatee shall not die before the executor.

Herein we have proceeded upon the authority of the civil law; we shall see in the ensuing cases, how far the temporal law agrees with the civil law in this matter.

Of the Legatee's dying in the Life-time of the Testator.

The creditor devises the debt to the debtor, directing several sums to be paid out of it. The debtor dies in the life-time of the testator, this to the debtor is a lapsed legacy, but the other sums must be paid.

What would have been a good devise in this case.

One devises portions to his children A, B. and C. and if any die before 21 or marriage, the portion of the child so dying to go to the survivor; one of the children dies in the life-time of the testator, this is not a lapsed legacy, but shall go over to the survivors.

THE testator by his will reciting that B. owed him 400*l.* gave and bequeathed the same to him, provided, that out of it he paid several particular sums in the will mentioned, to his wife and children, and the residue he freely and absolutely gave him, and required his executor, immediately on his death, to deliver up the security, and not to meddle with the debt, but to give such release as B. his executors or administrators should require. B. died in the life-time of the testator. It was held, that the money directed to be paid to the wife and children, was well devised, but as to residue devised to the debtor himself, it was a lapsed legacy, he dying in the life-time of the testator; but it was admitted, that if the testator had said, *I forgive such a debt*, or that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt, though the debtor had died in the life-time of the testator. *Eliot and Davenport, 2 Vern. 521. Wil. Rep. 83. Eq. Cas. Abr. 296. pl. 1. 2 Eq. Cas. Abr. 540. pl. 4.*

One Micklethwaite having issue two sons, Thomas and Joseph, and also three daughters, made his will, thereby giving 1500*l.* to his son Joseph, and 1000*l.* to each of his two daughters, and directed, that if any of his three younger children should die before their age of twenty-one, or marriage, then the portion of him or her so dying, should go over to the survivors, and gave his real estate to his eldest son, chargeable with these portions. One of the daughters died within age, and before marriage; Joseph the younger son died also within age, and before marriage, in the life-time of his father the testator: The father lived to have another

ther son, whom he named *Joseph*, and afterwards wrote a codicil at the bottom of his will, by which he confirmed the will, thereby taking notice, that since the last it had pleased God to give him another son, and gave a legacy of 500*l.* a-piece to his son *Joseph* and his surviving daughter, over and above what he had given them by his said will. It was objected, that by the death of *Joseph* in the life-time of the testator his father, the 1500*l.* portion given him became a lapsed legacy. Lord Chancellor said, that it was improper to call this a lapsed legacy, but it was a portion given over, and should take effect; that the making the codicil was a republication of the will, and did amount to a substituting the second *Joseph* in the place of the first; as if the testator had made his will anew, and had wrote it over again, by which new will the second *Joseph* must take; that the fixed intention of the testator appeared to be, that *Joseph* should have more than the daughter; whereas if the 1500*l.* legacy should be taken to be a lapsed legacy, then the surviving daughter should have twice as much as *Joseph*. *Hil. 1714.*

Perkins v. Micklethwaite, Wil. Rep. 274.

The testator *A.* devised 15000*l.* a-piece to the four children of *J. N.* by name; to the sons to be paid at their ages of twenty-one years, and to the daughters at their ages of eighteen years, or days of marriage; and in case one or more of the said children should happen to die before his, her or their respective legacy or legacies should become due, then such legacy or legacies should go to the survivor of them; and in case three should die, then the survivor should take the whole. If one of the children die in the life-time of the testator, the survivor shall take that share, and it shall not be a lapsed legacy. *Millor and Warren, 2 Vern. 207.*

Ledesham and Hickman, 2 Vern. 611.

The testator by his will gave 50*l.* to *A.* at twenty-one or marriage, and 50*l.* to *B.* at twenty-one

It has been held
that if a testator
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a son or daughter
and if he die
before the legatee
the legacy is not
lapsed.

Williams 967.
340. It has been
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testator give a
legacy to a son
or daughter and
if he die before
the legatee the
legacy is not
lapsed.

15000*l.* devised
to four at their
respective ages, and
if any of them die
before, to the sur-
vivors of them;
if one dies in the
life time of the
testator, his part
shall survive, and
not be a lapsed le-
gacy.

30. 417. *WV*

Legacy to *A.* at
21. and if he die
before, to *B.*

brothers and sisters, this is not a lapsed legacy though *A.* die before the testator.

ty-one or marriage, and wills, that if any legatee died before his legacy was payable, the same should go to the brothers and sisters of such legatee. *A.* died in the life-time of the testator. It was held, that the legacy was not lapsed, but should go to the brothers and sisters. *Darrel and Moleworth*, 2 *Vern.* 378. 2 *Vern.* 653, 744, *Vern.* 425. 2 *Ch. Rep.* 187. *Norby and Burbage*, *Wil. Rep.* 340. *Rep. Eq.* 136. *Prec. Ch.* 470.

Devise to two of *gol.* each at such a time, and if either died before, the other to have the whole; if one died before the testator, the survivor shall take the whole 100*l.*

The testator devised to *A.* and *B.* the two daughters of his brother *C.* to be paid them within a year after the death of his wife, viz. 50*l.* to *A.* and 50*l.* to *B.* if they shall be both alive at the time of payment; but if either of them shall die before, then the said 100*l.* to the survivor of the two daughters: One of the daughters died in the life-time of the testator. It was held, that the surviving daughter should have the whole 100*l.* *Mich.* 1691. *Scolding and Green*, *Prec. Ch.* 37.

One devises the surplus of his personal estate to four equally, and leaves *J. S.* executor in trust: one of the four dies in the life-time of the testator, his share shall go according to the statute of distribution.

J. S. inter al. bequeathed the surplus of his personal estate unto four persons, equally to be divided between them share and share alike, and made *A. B.* his executor in trust. One of the four residuary legatees died in the life of the testator, after which the testator died; and the question being, to whom the fourth part devised to the residuary legatee (who died in the life of the testator) belonged? The Lord Chancellor, after time taken to consider of it, delivered his opinion, That the testator having devised his *residuum* in fourths, and one of the residuary legatees dying in his life-time, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by will; that it could not go to the surviving legatees, because each of them had but a fourth part devised to him in common, and the death of the fourth residuary legatee could not avail them, as it would have done had they been all joint-tenants, for then the share of the legatee dying

Wil. Rep. 96.

dying in the life-time of the testator, would have gone to the survivors; but here the *residuum* being devised in common, it was the same as if the fourth part had been devised to each of the four, which could not be increased by the death of any of them: This share shall not go to the executor, he being but a bare executor in trust, and consequently it belongs to the testator's next of kin according to the statute of distribution; and as to this, the executor is a trustee for such next of kin. *Trin. 1721. Bagwell v. Dry, Wil. Rep. 700. 2 Eq. Cas. Abr. 344. pl. 3. 440. pl. 38. See Show. 91. Salk. 238. Prec. in Chanc. 567.*

One devised the residue of his personal estate to six persons, to each of them a sixth part, and made them executors; but one of these executors and residuary legatees, died in the life-time of the testator. *Lord Chancellor:* This is a lapsed legacy as to one sixth, and undisposed of by the will, the residuary legatees being tenants in common, and not joint-tenants; and therefore the legacy shall not survive, but go to the testator's next of kin, according to the statute of distributions. *Note;* this case 29 August 1734. was cited before Lord Talbot, who said it was plainly right; for that none of the other residuary legatees could have any more than a sixth part each; so that the sixth part of the residuary legatee, who died in the life of the testator, must go as undisposed of to the next of kin; but if any legatee, where there is a joint devise, dies in the life of the testator, it shall go to the surviving legatees, which could not be in the present case, for as much as each residuary legatee was to have no more than a sixth part. *Mith. 1728. Page versus Page, 2 Wil. Rep. 489. Mos. 42. 2 Stra. 820.*

One devises the surplus of his personal estate to six persons, to each a sixth part; one of them dies in the life of the testator; this is a lapsed legacy as to one sixth.

E. made her will, and devised as follows: I give to R. H. 300l. 100l. part whereof he owes me on bond, which I intend to give to S. H. his daughter, but my will and desire is, that he shall

300l. devised to R. willing and desiring him to pay it to S. at his death, or sooner give if occasion, for

her support : R. dies in the life-time of testatrix, this not a lapsed legacy to S,

give the 300*l.* to his daughter S. H. at the time of his death, or sooner if there be occasion, for her better advancement and preferment. R. H. died in *Ireland*, and about eight days afterwards the testatrix died in *England*, afterwards S. H. died at the age of sixteen, and unmarried. It was decreed, that the words *I desire*, or *I will*, amount to an express devise, and that the 100*l.* bond should be assigned to the administrator of S. H. and the 200*l.* paid him with interest from the time of exhibiting the bill ; although it was insisted upon, that a benefit was designed to R. H. and that he was not a bare trustee, but was to have the interest of the money for his life, unless the daughter had occasion for it before his death, which she had not. *Earles and England*, 2 Vern. 466, 467.

350*l.* devised to A. on condition at or before her death to give 200*l.* of it to her children ; A. died in the life-time of the testator ; this a lapsed legacy.

The testator devised 350*l.* to his sister, upon condition that she, at or before her death, should give 200*l.* thereof to her children. The sister died in the life-time of the testator. It was held, that the whole 350*l.* was a lapsed legacy ; for it being a devise of money, the absolute property vested in the first devisee. *Birkhead and Coward*, 2 Vern. 116.

A feme covert having by the will of her former husband a power of disposing of 400*l.* by will appoints it to be paid to a person, who afterwards died in her life-time ; their representatives shall have the money.

The testator devised an estate to his wife for her life, and after to his niece and her heirs, upon condition, and to the intent, that she pay 400*l.* to such person as his wife, by her will in writing, or any other writing should direct and appoint : The testator after dies, the wife marries a second husband, and then makes a will in writing, and thereby reciting the power by the will of her former husband, appoints the 400*l.* to be paid to her husband, his executors or administrators, and that out of it he should pay 100*l.* to B. 50*l.* to C. and 50*l.* to D. and makes her husband her executor, who subscribed his approbation of it : Afterwards the husband died, and made the wife executrix and residuary legatee ; then B. and

and *C.* died intestate, and afterwards the wife died. The defendant took out administration to her with the will annexed, and likewise administration to *B.* and *C.* The question was, whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and consequently void. It was held, that if this was a thing purely testamentary, it would plainly be a lapsed legacy; but in this case the 400 *l.* was not in its nature testamentary, but they take as nominees, and it is but the execution of a trust; and the money was decreed accordingly. *Mich. 1700. Burnet and Helgrave.*

Of the Legatees dying before the Time the Legacies are appointed to be paid, &c.

THE rule and distinction in these cases is agreeable to the civil law, which is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee dies before that age, yet this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum, in futuro*, the time being annexed to the payment, and not to the legacy itself; so if the legacy is made to carry interest, though the words *to be paid*, or *payable* be omitted, it shall be an interest vested; but if a legacy be devised to one at twenty-one, or if, or when he shall attain the age of twenty-one, and the legatee dies before he attains that age, the legacy is lapsed. *Dier 59. Leon. 177. Office of Executors 347. Swinb. Part 4. §. 17. vide 2 Vern. 416.* Where *Wright* lord keeper was of opinion, that there was no foundation for this distinction, and that the testator's intention was equal in both cases; but that was in a case where the legacy was to arise out of a real estate, which by better

ter authorities shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage-settlement. *Vide 2 Vern. 99, 617, 508. and 2 Vent. 366.* But when the legacy is to be paid out of a personal estate, the above distinction has been allowed of; and *Cowper* lord chancellor said, that though it was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee against the residuary legatee, who went away with the whole surplus of the personal estate; yet as chancery has now a concurrent jurisdiction with the spiritual court in matters of this nature, he thought it highly reasonable that there should be a conformity in their resolutions, that the subject might have the same measure of justice in which court soever he sued.

500*l.* devised to the daughter towards her marriage, if she die before she be married, her executors shall have it.

A man devised to his daughter 500*l.* towards her marriage. In this case it was the opinion of the court, that if she die before marriage her executors shall have it; but if the words had been, to be paid at the day of her marriage, or at the age of twenty-one years, and she died before both, it had been a lapsed legacy. *Lord Latimer's case, Dier 59. Godolph. Orph. Legacy, part 3. c. 17. §. 11.*

Aliter if devised to her when she shall be married.

It was agreed by the court, that if a man devise to his daughter 100*l.* when she shall be married, or to his son when he shall be of full age, and they die before the time appointed, and make executors, their executors shall not have it; but it is otherwise if the devise was to them to be paid at their full ages, and they die before that time, and make executors, their executors shall have it. *Godol. Orph. Leg. part 3. c. 17. §. 12.*

Devise to one at 21, and he dies before, the legacy is lapsed.

If money be bequeathed to one at his age of twenty-one years, and he dies before that age, the legacy is lapsed. *2 Ch. Ca. 155. 2 Salk. 415.* But

But if money be bequeathed to one at the age of twenty-one years, or day of marriage, to be paid to him with interest, and he dies before either, the money shall go to his executors. *Lampen and Clowberry*, 2 Ch. Ca. 155. 2 Vent. 342. 2 Salk. 415. 2 Vern. 673.

If a portion is devised to a child with interest, but not to be paid or payable until the child attain twenty-one years, or was married, and the child dies under age and unmarried; yet the portion shall go to the administrator of the infant. *Collins and Metcalf*, Vern. 462. The testator devised 50 l. to J. S. when of the age of sixteen years, and interest in the mean time to be paid quarterly; this is a legacy vested, because it carries interest. *Stapleton and Cheele*, 2 Vern. 673. Rep. Eq. 76. Prec. Ch. 317.

The testator devised 300 l. to his daughter, to be paid by his executor to four trustees, named by him in the will, to be employed at interest for her; provided, if she died without issue before twenty-one, then he gives the legacy to another: *Cur*. The condition is void, and the legacy absolute; but it was taken for granted, that if he had given it to her when she attains her age of twenty-one years, there if she die before, it is lapsed. 26 June 1685. *Disney and Dogget*.

The testator devises lands to trustees to be sold, and directs them to pay 100 l. to his daughter at her age of twenty-one, or marriage, which should first happen; she dies before either, and her administrator brings a bill for the legacy; the defendant demurs, supposing the legacy never vested in the infant, for that it was not due till twenty-one or marriage, and was the same as if the testator had given her the legacy when she should attain her age, &c. but the demurrer was overruled; for the lord chancellor took this to be the same as if the testator had given it her to be paid

Aliter if to be paid with interest.

Portion with interest devised to A. payable at 21. A. dies before, the legacy not lapsed.

Devises 300 l. to his daughter to be employed at interest, and if she dies without issue before 21. devised over; this a vested legacy to the daughter.

Devises money to be paid to his daughter at 21. or marriage; this a vested legacy, though she die before either.

at her full age, or marriage. 15 July 1699.
Philips and Philips.

A legacy out of
 a personal estate
 payable to an in-
 fant at 21. if he
 dies before 21,
 his executors shall
 have it; secus if
 the legacy is
 charged upon a
 real estate. 2
 Vern. 416. 2
 Williams 276.

Sir Thomas Doleman by will gave a legacy of 500*l.* to his nephew Lewis Doleman, payable at his age of twenty-five, and devised his real estate to trustees in fee, chargeable with the payment of his debts, legacies, &c. the testator died, and afterwards Lewis Doleman died an infant about sixteen years old: The Lord Chancellor said, that where the personal estate was not sufficient, and the real estate in failure thereof was made liable to answer the legacies, in case of the legatee's dying before the legacy became due, the charge upon the land determined; that it seemed but a very slight and superficial diversity between a legacy given at twenty-one, and payable at twenty-one; and though it had been established in the spiritual court as to legacies given out of personal estates, it did not deserve to be countenanced where the legacy is charged upon land, and the infant dies before twenty-one, or before the time when the legacy is made payable; wherefore he thought that the legacy, as to so much thereof as was payable out of the land, must sink. *Trin.* 1731. *Chandos and Talbot*, 2 *Wil. Rep.* 371. 601. See *Sel. Cas. in Chanc.* 24. 2 *Eq. Cas. Abr.* 89. pl. 13. 145. pl. 5. 545. pl. 2. 730. pl. 1. *Vern.* 72. 2 *Vern.* 92, 248, 416, 457. *Dy.* 59. pl. 15. *Salk.* 415.

The testator devised in these words, viz. I give 100*l.* a-piece to the two children of J. S. at the end of ten years after my decease: The children died within the ten years: It was held, that this was a lapsed legacy, and that it was so in all cases where the time is annexed to the legacy itself, and not to the payment; though it was objected, that this differed from the case where a man devises 100*l.* to J. S. at his age of twenty-one, because it is a contingency whether he shall attain to that age, but the expiration of the ten years is inevitable. *Snell and Dee*, 2 *Salk.* 415. *Vide Swinb.*

Devise of 100*l.*
 to A. ten years
 after testator's
 death. A. dies
 before the end of
 the 10 years, the
 legacy is gone.

Swinb. Part 4. sect. 17. Fig. 6. Part 7. sect. 23. Fig. 9.

A. gives 700 l. to the children of her daughter, and wills it to be paid amongst them at the decease of her daughter, and that the daughter should have the interest during her life, and dies; the daughter has three children at the decease of A. one of the children dies, and then the daughter dies: The lord chancellor held, that it was a present devise *solvend. in futuro*, and the words amongst them apporitions the thing, and the administrator of the deceased child shall have a share. 11 October 1682. Sir William Turner's case.

Money devised to A. to be paid after the decease of B. A. dies before B. the administrator of A. shall have the legacy.

Where a Legacy directed to be raised out of Lands, shall sink into the Inheritance.

THE testator devised 100 l. to his daughter for her portion chargeable upon a real estate, and payable at twenty-one, and the daughter died before twenty-one, the portion shall sink in the land; but it is otherwise if no time had been limited for the payment of the portion, for in that case it goes to the executor of the daughter, and there is no difference whether the portion is secured by settlement or by will, if to be raised out of a real estate and the party dies before it is payable. *Smith and Smith, 2 Vern. 92. 2 Vern. 416.*

Portion devised payable out of a real estate at 21. if the devisee die before, the legacy shall sink in the land.

The testator by will charged his lands with 6000 l. for the child his wife was then *ensient* with, if it proved a daughter, with a clause of entry for non-payment; a daughter is born, who dies: It was decreed that the 6000 l. should not be raised for the benefit of her administrator. *Norfolk and Gifford, 2 Vern. 208.*

The testator devised lands to be sold for payment of portions to younger children, and one of the children dies after the portion was payable, though

Aliter if the child dies after the portion is payable.

though before the lands sold. It was held, that it being an interest vested, his administrator should have it. *Bartholomew and Meredith, Vern. 276. Vide 2 Vern. 508. 2 Vern. 72.*

The testator by will gave 500*l.* to his daughter, to be paid by his executors at the age of twenty-one out of his personal estate and the rents of his real; and if not raised by that time, the executors to stand seised, and take the rents till 500*l.* is raised, and after payment gives the land to his son; the daughter marries at eighteen, and dies under twenty-one, leaving issue a daughter; the husband takes administration. It was held that the portion should be raised, and that by a sale, though the land would produce little more than the 500*l.* *Jackson and Farrand, 2 Vern. 424.*

Additional portion devised to a daughter out of lands, payable at 21 or marriage on a contingency of her brother's dying without issue male: She dies after 21 and marriage, but before the contingency happens, the money shall be raised for her representative.

Charles Whithers the testator devised, *inter alia*, as follows, *viz.* I give and bequeath unto my daughter Mary at her age of twenty-one, or day of marriage, which shall first happen, the sum of 2500*l.* and if my son Charles shall die without issue male of his body then living, or which may afterwards be born, then my said daughter shall have and receive at her age of twenty-one, or day of marriage, which shall first happen, the farther sum of 3500*l.* over and above the said sum of 2500*l.* but in case the contingency of my son's dying may not happen before the said age of my daughter, or her day of marriage, then she shall receive and be paid the said sum of 3500*l.* whenever it might afterwards happen: Then he devises his real estate to his son in tail, remainder to his brother in fee; and then says, that the said lands and premises shall be liable to and chargeable with the payment of the said sum of 3500*l.* whenever it shall become due and payable: And directs, that in case of the failure of issue of his son, his daughter, her heirs or assigns, should join in a surrender of some copyhold lands to the use of his brother, otherwise the legacy of 3500*l.* to be void. The daughter married, having attained her age of twenty-one, and

and died in the life-time of her brother, leaving the plaintiff her husband, who took out administration to her, and then her brother died without issue male: For the defendant it was insisted, that the daughter dying before the contingency happened, the money ought not to be raised for the benefit of the husband, but should sink into the inheritance for the benefit of the remainder man; and that by the words, *which may afterwards be born*, this legacy is to take effect after a general failure of issue, and consequently too remote. The plaintiff insisted, that a contingency before it happened might well vest in the party, and consequently be transmissible to the representative, and relied on 2 Vern. 348. Lord Chancellor: As to the question whether the words *which may afterwards be born* do not make this a void bequest as being too remote, had it been after a general failure of issue, it would not have been good, because it would then have kept in suspense too long; but here, take it in the most general sense, the contingency must arise within nine months after the brother's death; so that objection is intirely removed: Three things were by the will necessary to intitle the plaintiff's wife to this legacy, death of her brother without issue male, marriage, or attaining her age of twenty-one; all three have happened: The only thing to be considered is her death, upon which the whole must turn: It has been said, that where portions in cases of this nature are chargeable upon land, they will sink for the benefit of the heir; the leading case is that of lady Pawletti and lord Pawlett, Vern. 204, 321. the reason is, that if portions are given to be paid at eighteen, or marriage, and the party dies before that time, the occasion of raising it, viz. the advancement, ceases; and therefore the reason of giving it qualifies the grant itself. In the case of Broome v. Berkley, 2 Wil. Rep. 484. pl. 154. the lord Trevor delivered his opinion in the house
of

of lords, that in such cases as this, where the portion is contingent, and the child marries and then dies, the representative shall have it. In cases where the child dies so young that the portion could never be wanted, the court will not decree it to be raised, because there is no occasion for it. 2 *Vern.* 439. and *Tournay v. Tournay*; but there is no precedent where the court has dealt so hardly with a child, who dies after marriage, as to take that away which was intended for its provision! This though a future interest, is an interest, though not so good as one in possession; it is and may be a consideration of marriage: After twenty-one she might have released it, and therefore I do not see why it should not be transmissible to the representative. 2 *Vern.* 347. is an express authority; the case of *Bulkley v. Stanlake* is the same, 2 *Vern.* 758, 766. The case of *Snell v. Dee*, *Salk.* 415. weighs but little with me; first, I do not think it well reported; secondly, the reason seems idle. This, although to be raised out of lands, cannot receive a different construction from other cases; it remains money still: Although she has not lived to receive it, the contingencies having happened, it must go to her husband, who is her representative, and may well be supposed to have married in contemplation of this additional fortune, though depending on a contingency. *Trin.* 1735. *King v. Withers*, 16 March 1735. See 3 *Wil. Rep.* 414. pl. 116. *Chanc. c.* 22, 58, 138. 2 *Chanc.* 23 95. *Vern.* 20. 2 *Vern.* 293, 357, 452, 572, 720. *Cas. temp. Talb.* 117. *Prec. in Chanc.* 348. *Eq. Cas. Abr.* 112. pl. 10. 2 *Eq. Cas. Abr.* 656. pl. 10. This decree was affirmed in the house of lords.

Of specific legacies, abating, refunding, &c.

SPECIFIC legatees are to contribute towards Payment of debts, but not to other legacies, if the estate fall short. It was objected, where legacies are given to *A. B. and C.* to be raised out

Where specific legatees shall not contribute.

of the profits of the personal estate, and out of the profits of a lease, the legacy to *A.* to be first paid: The words *to be first paid*, are only in respect of time, and not that *A.* shall be intirely paid if there be not also sufficient for the satisfaction of the other legacies; and that it had been ruled, that where the monies have been limited to be raised and paid to younger children, and the elder to be preferred, in payment before the younger, yet if by computation it be found that it will not hold out to pay all, they shall all abate proportionably; to which opinion the lord keeper inclined, but he said, if the estate, after some were paid, became deficient by the fraud or ill management of the trustees, where it was sufficient at the first, there the legatees that are first paid shall not refund. These questions fell out upon the will of Sir *William Throgmorton*, *Hil. 1682.* 34, 35 *Car. 2.* *Vide Tilsley and Throgmorton*, 2 *Ch. Ca.* 132. *Brown and Allen*, *Vern.* 31. 2 *Ch. Rep.* 138.

Where a legatee shall abate in proportion though directed to be first paid.

Robert Rowland 23 February 1734. made his will, and declared in the introductory part, that he disposed of his estate in the manner following; then gives some real and personal legacies to his nephew *Robert Snablin*; afterwards gives to his niece *Anne Snablin* 5000 *l.* in the old annuity stock of the *South-Sea* company, and then says, *Item*, I give to my cousin *Robert Purse* 5000 *l.* in the old annuity stock of the *South-Sea* company; makes *Robert Snablin* residuary legatee, and *Robert Purse* sole executor. At the time of making the will, and likewise at the death of the testator, he was possessed only of one sum of 5000 *l.* old *South-Sea*

The testator devises to *A.* 5000 *l.* *South-Sea* stock, and to *B.* 5000 *l.* *South-Sea* stock, the testator has but one 5000 *l.* *South-Sea* stock, each shall have 5000 *l.* *South-Sea* stock made good to them out of the personal estate.

R

annuity

annuity stock, but his personal estate was more than sufficient to pay all his specific and other legacies: The master of the rolls thought that only one 5000*l.* *South-Sea* annuity stock passed by the will, and decreed, that it should be divided between the legatees *Anne Snablin* (since married to *Charles Townshend, Esq;*) and *Robert Purse*. The parties appealing from this decree, the lord chancellor said, that as to the intention of the testator, he has by plain words given 5000*l.* stock to *Anne Snablin*, and therefore it cannot be denied but he intended to give it to her; how then can it be disputed afterwards that he did not mean the same thing by the same words? As to the argument, that the testator either mistook the quantity of stock he had, or forgot he had disposed of it at the time of making the latter devise: A mistake is never to be presumed, if a rational consistent meaning can be found; here it is improbable, almost impossible, he could mistake; neither is the testator to be charged with forgetfulness, unless from necessity; here the latter legacy follows so close, it is hardly possible the testator could forget the first legacy: A man capable of making a will, as I must take the testator to be, his will having been proved, cannot be presumed so soon to forget himself: As to the argument, that the testator intended to give the same thing between both, this is inconsistent with the other way of arguing: Every word in a will shall have effect, if it can be obtained: The testator has not in either clause described the *South-Sea* annuity by the words *my South-Sea* annuities: If a man bequeathes *his* watch or diamond ring, and has no such thing, the legacy will be void; but if he bequeaths *a* watch or diamond ring, the legacy will be due, and have its effect, although he had neither watch nor diamond ring: If it had appeared the testator intended to give these legacies only out of the particular quantity of stock he

had, the objection had been good; but the legacies may take effect as an injunction to the executor to purchase stocks, so far as they are to be found in specie amongst his assets. *The Digest book 33d, the Digest legacies, Tit. 2. sect. 3. Domat's Civil Law, fo. 159. Swinh. P. 7. sect. 24 fo. 293. P. 3. sect. 6. fo. 95. P. 7. sect. 5. P. 247.* As to stocks, they are a new kind of property; stock is changeable and fluctuating, and as easy to be bought in the market as a watch or a ring. There are two kinds of specific legacies; the first is a gift of a particular individual chattel or thing specifically described, and distinguished from all other things of the same kind; the other is where some goods of a particular kind or species are given, which the executor may deliver; as a horse, or an ox, &c. The first, where a particular thing distinguished from all other things of the same species is given, is what is most commonly meant by the term specific legacy, but is more properly an individual legacy: If such a gift as this is made, and not found, the legacy fails; or if given to A. and B. they must take it between them. To affirm the gift of 5000 l. Old South-Sea annuity stock, is a specific legacy, in this sense, is begging the question; from the penning of the will and the apparent intention of the testator, this gift is not confined to the same individual sum which the testator had by him, consequently cannot be a specific legacy in that sense. The other sort of specific legacy is that, where goods of a particular kind of species is given, which the executor may pay or satisfy by giving the like quantity: So far as a legacy thus described can be a specific legacy, I admit the present is such; it is a legacy consisting in quantity, measure, or value only. In the case of *Partridge and Partridge* in this court 27 November 1736. it was determined legacies of quantity of stock are not to be taken as specific legacies: In that case the testator by his will gave 1000 l. South-Sea stock to his wife, with power

Specific legacy,
what it is.

to dispose thereof amongst his children as she should think fit: At the time of making the will the testator had 1800*l.* stock, he afterwards sold 1600*l.* and after that purchased as much stock as made the remainder 1600*l.* stock: Upon this a question arose, whether the selling 1600*l.* out of the 1800*l.* was not an ademption of the legacy? And it was resolved, if a man possessed of stock bequeaths it, and after sells, and after purchases it again, the devise is good; but if at the time of the will made he had no stock, this would be a direction to the executor to purchase so much stock: The latter part of this opinion is an authority in point; if the testator in this case had had no *South-Sea* annuities at all, the executor would have been obliged to purchase; I do not declare in all cases of bequests of stocks, that they are to be considered as pecuniary legacies; no, they are always to be understood according to the particular circumstances of the case; for this reason I agree with the case of *Ashton* and *Ashton*, determined by lord *Talbot* in this court; 3 *Wjl. Rep.* 384. pl. 106. *Cas. Temp. Talb.* 152. *Prer. in Chanc.* 226. *Vern.* 165. there the testator gave to trustees 6000*l.* *South-Sea* annuities, on trust that they should sell and dispose of the same as soon as conveniently could be after his decease, and apply all the money in the purchase of lands to be settled according to the directions of his will: At the time of making the will he had but 5300*l.* *South-Sea* annuities; and it was decreed, that the legacy should not be made up 6000*l.* Here was a plain intention to give only what he had; this was such a misapprehension as a man might naturally fall into; the trust likewise went a great way in the consideration of that case, which was to sell and dispose of the stock as soon as could be after the testator's decease; for the testator could not design the money should be laid out in stock in order immediately to be turned into money again: Wherefore let the said *Robert Purse* assign
to

to the said *Charles Townshend* and *Anne* his wife one moiety of the said 5000*l.* Old *South-Sea* annuities, and pay them a moiety of all dividends since the testator's death, and retain the moiety of the said annuities and dividends unto his own use, and lay out a sufficient part of the testator's personal estate in the purchase of 5000*l.* Old *South-Sea* annuities, and let one moiety thereof be transferred to the said *Charles Townshend* and *Anne* his wife, and the other moiety be retained by *Robert Purse*; and let the master compute how much the dividends of 5000*l.* old *South Sea Annuities*, from the end of one year after the testator's death, would have amounted unto, and let one moiety thereof be paid to the said *Charles Townshend* and *Anne* his wife, and the other moiety be retained by the said *Robert Purse* out of the testator's personal estate. *Purse and Snablin.*

The testator by will devised to his wife all his personal estate at a place called *W.* and devised several legacies to other persons; the assets prove deficient to satisfy those legacies. It was held, that the legacy, to the wife, being a specific legacy, should take place. *Sayer and Sayer, 2 Vern. 688.* A specific legacy shall not abate in proportion with a pecuniary legacy. *Vern. 31. 2 Vern. 111. 2 Cb. Ca. 25, 171. 2 Salk. 416. Nelf. Ch. Rep. 303.*

A specific legacy shall not abate in proportion with a pecuniary one on a deficiency of assets.

A. by will devises 3400*l.* to be laid out by his executors in the purchase of exchequer annuities, to be enjoyed by his wife for life, she releasing her dower, and then to go equally to his two daughters, bequeaths 100*l.* a-piece to his two daughters and dies, leaving little more than would pay the 3400*l.* Money to be laid out in annuities or land, is looked upon in equity as an annuity or land, and therefore a *specific legacy*, and to be preferred before a *pecuniary legacy*, which if there be no sufficient assets must be lost. *Trin. 1710, Burridge and Bradyl, Wil. Rep. 127. 2 Eq. Cas. Abr. 552. pl. 5.*

Devise of 4000 l.
due on a bond, a
specific legacy.

Specific legatees
shall contribute
to debts in pro-
portion.

A creditor may
make a legatee
refund.

Where one
legatee may make
another legatee
refund.

Where an execu-
tor may compel
legatees to refund.

The testator having 4000 l. owing to him on a bond taken in the name of trustees, devised it to his daughter, and devised a lease he had of a farm to R. D. and made his daughter residuary legatee; the surplus of the testator's estate not being sufficient to pay his debts, the lease was sold, and the 4000 l. was brought into court to be applied in discharging the testator's debts; the debts being paid, the daughter applied to have the remainder of 4000 l. R. D. insisted to have a satisfaction out of it for the value of the farm devised to him, and which was sold for payment of debts. The court held, that the 4000 l. was a specific legacy, and therefore R. D. should have but a proportionable part of the value of his specific legacy out of it. *Lord Castleton and Lord Fanshawe, Prec. Ch. 99.*

A creditor may make legatees refund in case of a deficiency of assets, though there be no provision for refunding. *Vern. 94, 162. 2 Vern. 205. 2 Vent. 360.*

One legatee may compel another to refund where the assets prove deficient, though there be no provision for refunding. *1 Vern. 94.* But if the executor is solvent, and he voluntarily paid the legacy, the unsatisfied legatee may come upon him, and oblige him to pay the second legacy out of his own purse. *Ch. Rep. 132. 2 Ch. Ca. 132. Ch. Ca. 136, 248. 2 Vent. 360.*

If an executor applies the assets in satisfaction of legacies, and afterwards debts appear of which he had no notice at the time of paying the legacies, he may compel the legatees to refund. *1 Ch. Ca. 136.* So he may, if compelled by a decree in chancery to pay legacies. *2 Vern. 205.* But if an executor voluntarily pays a legacy or assets to the devisee thereof, he cannot, either in favour of other legatees or creditors, compel the legatees to refund. *2 Vern. 205. 2 Ch. Ca. 9. 2 Ch. Rep. 248. 2 Ch. Ca. 145. Vern. 90, 453, 460.*

Sir

Sir *Martin Noel* having a plantation in *Barbados* to him and his heirs, by his will in writing devises it to his four younger children and their heirs: About six years afterwards *Robinson*, one of his executors, supposing by an estimate of the estate of Sir *Martin*, that there would be sufficient to pay debts, or supposing the lands not to be testamentary, did lease the plantation for years by indenture, wherein he named himself as executor of Sir *Martin*, and guardian of his four younger children, and reserved a rent to himself in sugars to the value of 100*l.* per Annum, in trust, and for the benefit of the said younger children: Afterwards the estate of Sir *Martin* falls short of his debts above 20,000*l.* and *Robinson* the executor paid 6000*l.* of his own estate further than came to his hands: The children brought a bill for the execution of the said trust: The defendant insisted to retain the plantation towards satisfaction of his own debt. Lord Chancellor: This a good and full assent to the legacy, and not only for the term, but for the whole interest and thing devised, for the legacy is intire; as you have paid the legacy, and voluntarily, it is at your own peril; if this court had decreed you to assent to the legacy, and then debts had been discovered, the court would relieve against their own decree; and if they had come now to improve the assent to serve them here or at law, we would not help them; but they come for the execution of a trust which you have created by your lease; you have put the thing in another light than it was; for the administrator *de bonis non* cannot have the rent, and it cannot be assets to Sir *Martin's* debts; your assent is voluntary, and you might have taken security to refund. Whereupon it was decreed for the plaintiffs. 11 October 1682. *Noel* and *Robinson*, 2 *Vent.* 358. *Vern.* 90, 453, 460, 469. 2 *Ch. Ca.* 145. 2 *Ch. Rep.* 248.

The voluntary assent of an executor to a legacy binds him, tho' afterwards debts appear.

Aliter if decreed in chancery to assent.

Of the Time of Payment of a Legacy.

Legacy payable at twenty-one, the legatee dying before, it shall not be paid to the administrator before that time would have come if he had lived. Aliter if devised over to another.

IF a legacy be given to a child payable at his age of twenty-one years, and the child dies before he attains that age, though the administrator of the child is intitled to the legacy, yet he shall not have it till such time as the child, if he had lived, would have attained his age of twenty-one years. 2 Vern. 199. 2 Williams 478. But if a legacy be devised to a child payable at his age of twenty-one years, and if he dies before that age, then the legacy to go over to another: In this case if the child dies before he attains the age of twenty-one, the second legatee shall have the legacy immediately. Pasworth and Moor, 2 Vern. 283. Launde and Williams, 2 Wil. Rep. 478. Eq. Cas. Abr. 299. 2 Eq. Cas. Abr. 561. pl. 9. See An. 33. 2 Vern. 283, 347. Leon. 278.

Where a legacy payable on marriage was paid immediately.

A legacy payable upon marriage with consent of trustees; but if the legatee married without consent the legacy to go over to another. It was held, that the legacy should be paid immediately on security to refund in case of breach of the condition. Needham and Vernon, 2 Vern. 422. vide antea fo.

To whom Legacies may be paid.

Where a legacy is devised to an infant, whether payment to the legatee's father is sufficient.

A Legacy of 125 l. was given to the plaintiff, being but ten years old, and at that age was paid to the plaintiff's father, who died insolvent: This was held good payment, but the executor having taken a bond to save him harmless, it was decreed that he should pay it over again, for he had paid it at his own peril. Holloway v. Collins, Cha. Ca. 245. A legacy of 100 l. was devised to an infant of about ten years of age, the executor paid this legacy to the father, and took his receipt for

for it; when the infant came of age, his father told him he had received the legacy, but could not pay it him immediately, and said he would not have him trouble the executor, for he would give it him; the son rested satisfied with this for about fourteen or fifteen years, and his father and he having carried on a joint trade together, became bankrupts; this legacy of 100*l.* being amongst other things assigned by the commissioners for the benefit of the creditors, the assignee brought a bill against the executor for an account and payment of this legacy; the defendant insisted on the extreme hardship of his case, if he should be obliged to pay the legacy over again, that he had justly paid it to the father whilst he was in good circumstances, and that if application had been made sooner, he might have had his remedy over against the father; that the father was by nature guardian to his child, and that formerly payment to him was allowed to be good. The lord chancellor said, that if the father had not made the son such promise of recompence, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of father drew him to forbear applying to the executor sooner, and since the father had not, and could not now make good his promise, being a bankrupt, the reason of the son's forbearance was at an end; he thought the rule of this court in not suffering parents to receive their childrens legacies was founded on very good reason; and therefore, lest hereafter this case should be cited as a precedent, when the circumstances attending it might be forgot, and to discountenance and deter others from paying such legacies to the parents (though he did not deny the hardship of this particular case) he decreed for the plaintiff against the executor. *Mich. 1715. Doyley and Tollferry.*

Morley devised 100*l.* to his daughter *Elizabeth Palmer*, a feme covert, and dies; the executor pays it to *Elizabeth*, who spends it in her own maintenance;

See Bunb. Rep.
240. pl. 312.

Whether payment to a feme covert be good.

nance; her husband sues for it, and the question was, whether this was a good payment to the wife, it being in proof that at the time of making the will, *Palmer* and his wife lived a-part, and the husband did not allow her maintenance, and so it is a strong presumption that the deviser intended this for her separate use. *Lord keeper*: If it had been so given in express terms, the payment to her had been good; but as it is, the husband must have it decreed: He said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it. *2dly*, The will appointing the legacy to be paid within six months after the testator's decease, the lord keeper decreed the husband interest from that time; but if no time limited, no interest. 4 November 1684. *Palmer v. Trevor*, 1 Vern. 261.

Where Legatees shall have maintenance and Interest.

Where on a legacy devised to an infant payable at twenty-one, he shall have interest or maintenance.

A Legacy was left to R. payable at his age of twenty-one years, he by his guardian brought a bill against the executor for maintenance, suggesting that he had none; the executor demurred, for that the plaintiff was under age, and the legacy was not payable till twenty-one, and therefore no cause of suit; but the demurrer was overruled. *Rennesy against Parrot*, 1 Ch. Ca. 60. *Nels. Ch. Rep.* 101. If a father devises a legacy to a child payable at his age of twenty-one, without any provision for his maintenance in the mean time, the child shall have interest for the legacy from the death of the father till paid; for the father, if he had lived, was obliged to maintain the child; but if the devise be by a stranger, it is otherwise, because he was under no such obligation. *Trin.* 1712. *Attorney General and Thomson*, *Proc.*

Proc. Ch. 337. The father by his will gave 2000*l.* a-piece to his two daughters, charged on his real and personal estate, and payable at their respective ages of twenty-one years; the personal estate being exhausted by debts, the lord chancellor held, that they should have a reasonable maintenance out of the real estate till their respective legacies were payable, and accordingly allowed them 80*l.* a year a-piece. *Trin. 1729. Conway and Longville.*

A legacy of 100*l.* was devised to an infant, and 50*l.* to bind him apprentice; the infant dies, and his administrator demands an account; the executor had the education of the infant, and prays an allowance of what he had expended in educating the infant; the administrator insists, that he ought only to have allowance as far as the interest of the money would reach, but that he ought not to have diminished the principal. *Lord keeper:* If the interest be not sufficient for a suitable education, it must go out of the stock, for it is for the infant's advantage, and may fit him for preferment, or a better way of living; but expences in things neither necessary nor suitable, cannot be allowed. *2dly,* The question was, whether the legacy of 50*l.* was not extinct, because he died before he was put apprentice. *Lord keeper:* It shall go to the administrator. *27 October 1684. Barrow and Grant.*

Where on a legacy devised to him generally, he shall have maintenance out of the principal.

Prideaux devises to his wife *Luttrell's* mortgage, (which was for 1000*l.*) and all the interest of it which would be due at his death; and afterwards he declares his mind to be, that his wife should give to *M.* his granddaughter 500*l.* of the said mortgage, but the time of payment, and manner how, he left to the discretion of his wife as she should see it best for her: The wife lives twenty years afterwards, and makes *Speke* her executor and dies; the granddaughter marries *Churchill*, and her husband and she exhibit their bill to have the legacy and

Legacy to be paid in such time and manner as executrix shall think fit, legatee shall have interest from death of testator.

and interest. It was objected that she could not have interest, because the testatrix had during her life to pay the legacy, unless hastened by request, and no request appears. *Lord keeper*: The 500*l.* was a present gift, and interest for it must be paid from the death of the deviser, and this power in the wife was to the intent she might employ it for a separate maintenance, if occasion, or to pay it at age or marriage to increase her portion, when if it had been paid to her guardian, it would perhaps have been spent in maintenance. *Keck* said, that where *A.* had issue by two venters, and gives 500*l.* to his wife, to the intent that she should distribute it amongst his children in such proportions as she in her discretion should think fit; she gives one shilling a-piece to his children by the former wife, and the rest to her own; but this was held unjust, for her discretion ought to be *secundum æquum et bonum*: The decree was drawn up, and signed and inrolled, and upon a bill of review the decreeing the money to be paid generally by the executor, without regard to assets, &c. was assigned for error. The lord keeper held, 1st, That it must only be *de bonis testatoris*, for the executor has no way misdemeaned himself. 2^{dly}, If legacies are paid, and there is not sufficient to pay the interest of the 500*l.* so much of the interest is lost, for the plaintiff sits still all the life-time of Mrs. *Prideaux*, who did not suppose interest was payable. 3^{dly}, Interest should only be paid for such time as Mrs. *Prideaux* received interest, and if she received but four or five *per cent.* the executor should answer accordingly, and have just allowances. 15 October 1684, *Churchill v. Speke*, *Vern.* 251. *vide Vern.* 262.

Residue devised to the executor, and afterwards by the same will to the son at his age of twenty-one, he shall have the interest till twenty-one.

The testator devised 40*l.* to his brother for his care, and gives several other legacies to other persons, and then gives all his goods, mortgages and personal estate to his brother, and afterwards in the same will says his son shall have the residue of his estate at his age of twenty-one years;

years: The brother, who was the executor, thought that by this devise to him, he should at least have the profits and interest of the estate till the son's age of twenty-one years; but the lord chancellor said he was but a trustee for the son as to the profits, as well as to the estate or principal.
23 Nov. 1687. *Pell and Pell*.

When a legacy is devised payable at a certain time, the legatee shall not have interest but from the time of a demand made; but this is in the case of a person of full age; it is otherwise if the legatee be an infant, because no laches shall be imputed to him. *Jolliff and Crew, Pres. Ch. 161.*
2 Salk. 415.

Where a demand is necessary to intitle the legatee to interest.

Of Contribution by Devisees, &c.

IF lands are devised to one for life, remainder to another in fee, and the lands are charged with the payment of a sum of money, either by a former devise, rent-charge or mortgage, the tenant for life shall contribute and pay a proportionable part of such sum. *Hayes against Hayes, 1 Ch. Ca. 223. Finche's Ch. Rep. 231.*

Lands were mortgaged in fee for 100*l.* the mortgagor devised those lands to *A.* for life, remainder to *B.* in fee, and made *A.* executor, and left assets sufficient to pay the debts, which *B.* in remainder prayed might go to the payment of the mortgage, as in the case of an heir who should be relieved upon the personal estate in such case; but the court took a difference; there indeed the heir shall be relieved, but not a trustee, and decreed that the tenant for life should contribute one third, and he in remainder two thirds to redeem. The same day another cause, where a jointress was of lands mortgaged, *Bertue and Style*; decreed that the jointress, paying the mortgage, should hold over till she and her executors were repaid with interest. *Cornish against Mew, Ch. Ca. 271.*

In this proportion tenant for life shall pay one third, and he in remainder two thirds.

271. Also where the mortgagee devised the mortgaged lands to *A.* for life, remainder to *B.* in fee, and the mortgagor redeemed the land, it was decreed that *A.* should have one third, and *B.* two thirds of the mortgage money. *Brent and Best, Vern. 76.*

If tenant for life die, his executor shall only contribute in proportion to the time he lived.

Lands in mortgage are devised to *A.* for life, remainder to *B.* in fee; *A.* takes an assignment of the mortgage in a trustee's name; though *B.* might have compelled *A.* to contribute one third towards payment of the mortgage in respect of his estate for life, yet *A.* being dead, and a bill being brought against his executor, it was held, that he shall be obliged to contribute only in proportion to the time that *A.* his testator enjoyed it. *Clyat and Battafson, Vern. 404.*

Tenant for life to pay two fifths, and remainder man three fifths.

The testator devised to *B.* for life, and after one third of the reversion to each of his three sisters respectively, and her heirs; the sisters brought a bill for the discovery of incumbrances on the estate, and to compel the defendant tenant for life, to bear his share and proportion thereof, alledging, that their reversion would be of little use to them if the debt was suffered to increase by non-payment of interest, &c. and charged that the defendant had cut down timber, for which he ought to be accountable. It was decreed, that the defendant should pay two parts in five of the debts, and the reversioners the remaining three fifths, and the timber, and what was raised by it, to be taken as part of what the reversioners were to pay. *Humphreys and Hales, 2 Vern. 276.*

Where a devisee of a real and a devisee of a personal estate, shall contribute towards debts.

The testator devised his real estate to his son for life, remainder to his first son, &c. in tail, with remainders over, and devises a leasehold estate to his daughter and dies, not leaving assets to pay debts, which affected as well his real as his personal estate: It was held, that the son and daughter should contribute in proportion in paying the debts, each estate being liable at law, and the testator's intention being equal between them both. *Short and Long, 2 Vern. 756.*

Of Ademption of Legacies.

Ademption of a legacy is the taking away a legacy which was before bequeathed; an ademption may either be expressed or implied.

An ademption is not to be presumed unless it be proved, and therefore, if the testator bequeaths all the corn in his barn, and after uses that corn, and puts other corn in the place of it, the using the corn is no ademption of the legacy, but the legatee shall have such corn as was in the barn at the testator's death, unless it be a greater quantity than that corn that was there at the time of making the will; for so much is due, but not a greater quantity.

If the testator bequeaths a ship, and afterwards by piecemeal repairs and renews the same, so that nothing remains of the old ship but only the bottom tree; this is no ademption of the legacy, but the legatee shall have the whole ship.

If the testator bequeaths a house, and afterwards by piecemeal repairs the same, so that there is no part of the old matter or stuff remaining, it is not to be presumed that the will of the testator is changed, but the legatee shall have the house.

But if the testator voluntarily pulls down all the whole house, and afterwards erects a new house in the same place, the will of the testator is presumed to be changed, and therefore the legacy is extinguished, unless a contrary meaning be proved in the testator; as that he did not intend to revoke the devise by destroying the thing devised, or after re-edifying confirms his former will, without which proof the legacy is so absolutely extinguished, that although the testator pulled down the house with intent to re-edify or make it bigger, and although he re-edified it with the same matter or stuff, yet the legatee cannot recover.

cover it, for it is not the same thing that was bequeathed; so it is if the house be casually destroyed by tempest or fire, and re-edified.

Where an alienation by the testator of the thing bequeathed shall be an ademption.

If the testator bequeaths a thing, and afterwards by necessity, as for payment of debts, &c. unwillingly alienates the legacy, this is no ademption of the legacy, but the executor must redeem the same, or pay the full value; unless it be proved that the testator did intend by the alienation to take away the legacy: But if the testator do voluntarily of his own accord, not being constrained of necessity, alienate the thing bequeathed, this is an ademption of the legacy, even though the testator should afterwards redeem the thing alienated, unless the legatee be near of kin or allied to the testator; in this and some other cases, the legacy redeemed may be recovered.

What if only pledged.

But if the testator do not fully alienate the thing bequeathed, but only pawn or pledge it, this is no ademption of the legacy, but the executor is bound to redeem, and restore the legacy to the legatee, or pay the value of it, if he suffers it to be forfeited.

What if part only alienated.

If some part only of the legacy be alienated, the other part not alienated is due, and may be recovered, unless it be proved, that the testator did mean, by alienating part, to take away the whole legacy.

What if a thing or the value of it be bequeathed, and the thing is alienated.

If the legacy be in the alternative, as if the testator bequeath something, or the value of it; though the thing be alienated, the value may be recovered.

Whether receiving a debt bequeathed be an ademption.

If the testator bequeath an obligation or a sum of money due to him, and afterwards the debtor voluntarily pays the debt unto the testator, the receipt of the money is no ademption of the legacy; but if the testator compels the debtor to pay the money, it is an ademption of the legacy; unless the legatee be able to prove that the testator did thereby

thereby mean to revoke the legacy ; for perhaps the testator sued for the debt the better to secure the legacy, as suspecting the debtor to be in dubious circumstances ; for this *vide antea* the case of *Orm and Smith*. 2 *Vern.* 681. *Rep.* 82. *Ford and Flemming*. 2 *Will. Rep.* 504, &c.

If the testator bequeaths a flock of sheep, and afterwards the number decreases, so that they become fewer than a flock, (a flock consisting of ten at the least) in this case the will of the testator is not presumed to be altered, nor the legacy adempted, but the legatee shall have what remains of the flock. If a flock of sheep be bequeathed and they diminish, what remains is due.

A legacy may be adempted by translation, which is by bestowing a legacy bequeathed upon another person. Of ademption by translation what it is.

A legacy being transferred from one to another, though the second legatee be incapable of taking, the first legatee cannot recover the legacy ; for the testator's intention was two-fold ; *First*, that the first legatee should not have the legacy ; *Secondly*, that it should go to the second legatee ; and the intention of the testator shall be observed as far it can, though it cannot be performed in the whole. What if a second legatee be incapable of taking.

Every translation includes an ademption, except in certain cases ; as if the testator, being *in extremis*, transfers a legacy, bestowing it upon some other person, and afterwards recovers his health, the translation is void, and the former legacy shall stand. If the testator having bequeathed a legacy to one, and having provided, that if the legatee will not do such a thing, to another person, then that other person shall have the legacy : In this case, if the first legatee be prevented by death from performing the condition, the second legatee shall not have the legacy. Where a translation does not include an ademption.

If the testator gives 100*l.* to *B.* charging him to distribute 10*s.* yearly for ten years amongst the poor, and afterwards the testator bestows that Whether a condition imposed on the first legatee shall be transferred with the le-
100*l.*

gacy to the second legatee.

1001. upon C. without mentioning any such yearly distribution; C. is charged with the yearly payment and distribution of 10s. But this rule will not hold in certain cases, as where the second legatee can prove that the testator's intention was otherwise, and that the legacy should be simple, and without any charge or condition. When the condition cleaves to the person of the first legatee, as if the testator bequeaths to a woman with child 1001. if she be delivered of a boy, this condition is not transferred with the legacy: When the translation is made to the same person, without mention of any further charge or condition, for that the second bequest shall not be esteemed superfluous, it shall be presumed that the testator meant by the second bequest, to give the same thing simply; when in the translation of the legacy a new charge or condition is imposed, for then the former is presumed to be remitted.

A legacy bequeathed to one, and afterwards to another.

If the testator, having bequeathed a legacy to one person, afterwards bequeaths it to another, we are to consider whether it be some *special certain thing* that is bequeathed, or a thing consisting in *quantity*.

If of some special certain thing, and the latter bequest does not mention the former, the legatees ought to divide the legacy

What if it does mention the former.

Vide antea 241. Purse and Snablin.

If the thing bequeathed be some *special certain thing*, as his signet, his books, or his horse, &c. in case the second bequest is simple (without mention of the former) the former bequest is not taken away; but the two legatees ought to divide the thing between them: But if the latter bequest do mention the former, as if the testator says, my signet which I bequeathed to A. B. I bequeath to C. D. it is the opinion of the most part, that the former bequest is not wholly gone, but that the legatees shall take the thing jointly, except in certain cases; as where the testator's intention appears (at least by conjectures) that the former legatee should be excluded; or where the second bequest is not made in the same will, but in a codicil; or where the testator in the second bequest says,

says, that which I did *bequeath* to A. B. I *give* to C. D. for the word *give* is of such force that it seems wholly to take away the former legacy.

When the legacy consists in *quantity*, as if the testator bequeaths to one man 100*l.* and immediately after to another man 100*l.* here is neither translation nor ademption, but two several legacies, and each legatee shall have 100*l.* but if the testator restrain this quantity to a certain body, as to 100*l.* in such a bag, then it falls under the former rule of the bequest of some special certain thing.

If it consists in quantity, as 100*l.* to A. and 100*l.* to B. there is neither translation nor ademption.

If the testator bequeaths to one man 100*l.* and afterwards in the same testament bequeaths to the same man 100*l.* the second bequest is understood to be but a repetition of the former, and all but one legacy, and therefore the legatee can recover but one 100*l.* unless he can prove that the testator intended to give him both sums, or unless the sums were unequal, as the first 100*l.* and the second 50*l.* in this case he shall recover 150*l.* or unless the testator bequeathed him 100*l.* by his will, and another 100*l.* by a codicil; for then he shall have 200*l.* except the executor can prove the testator intended otherwise.

What if one sum be twice bequeathed to the same person.

A. devised that 300*l.* should be paid to his child which he should have at the time of his death, and if he had none, then to his sister; he had afterwards three children, then by a codicil he devised 200*l.* to each of those children to be paid at their respective ages of twenty-one: The lord chancellor decreed, though the 300*l.* be devised to the child, &c. and now there are three, the devise is not void for uncertainty, but all three children share in it; and that the devise of 200*l.* being without words signifying the same to be for their portions, nor any thing one way or another to revoke or affirm the former gift of 300*l.* it shall be taken by way of accumulation, and the children shall have both legacies. *Pit and Pidgeon, Ch. Ca.*

Testator devises 300*l.* to such child as he should have at his death; afterwards he has three children, and by codicil devises them 200*l.* apiece, they shall have both legacies.

301. *Vern.* 95.

S 2

Sir

Devise of 2000*l.* to A. and on a contingency 5000*l.* the contingency happening, A. shall have both sums.

Sir William Jones by will gives 2000*l.* to his grand-daughter at her marriage or age of 18 years, and after other legacies he gives the *residuum bonorum* to his son, and if he dies before twenty-one, he gives his lands over to his brother, and then he gives his grand-daughter 5000*l.* The lord chancellor, assisted by Mr. justice Lutwyche, and Mr. baron Powell, decreed that the 5000*l.* was over and above the 2000*l.* so that the grand-daughter should have 7000*l.* in the whole; for if the son died (as he did) then the grand-daughter was heir to the testator, and so he disinherits her, and gives her 5000*l.* as a compensation. 21 May 1688. *Jones and Tillotson.*

A legacy adempted by giving the child a portion.

The testator devised 200*l.* to his daughter, and gave her his household goods, if she should not be married in his life-time; afterwards he gives with his daughter above 200*l.* in marriage, and dies, not having revoked or altered his will. The court held, that the legacy was extinguished by the portion. *Jenkins and Powel, 2 Vern. 114.*

The testator devises a lease to his daughter, and wills that it shall be renewed in her name; he afterwards renews it in his son's name, this is no ademption.

Joseph Jackson, a merchant of *Bristol*, being possessed of a lease for 99 years, determinable upon the death of his brother, who was an ancient person, by his will devises all his estate and interest in those lands, to his daughter, and desires his executor to renew it for years, determinable upon the death of his daughter; afterwards the testator himself renews the lease for 99 years, determinable on the death of his son, and then adds several codicils to his will, but makes no further mention of these lands. It was the opinion of the master of the rolls, that this lease should pass to the daughter, and that the testator's renewing it in the name of his son was no revocation. 5 July 1688. *Altham's case, vide 2 Vern. 209.*

A devise to children of A. of a debt due from A. to the testator, the testator calls in the money, the legacy is extinct.

Admiral Littleton by will devised to James Masters second son of Sir Harcourt Masters, 500*l.* part of the money owing to him by Sir Harcourt, the rest of the money owing to him by Sir Harcourt he

he gave to and amongst all the rest of the younger children of Sir *Harcourt*, the same to remain in Sir *Harcourt's* hands until the children shall be capable of receiving it, and the legacy or share of any of them dying before such time, to go to the survivors and survivor of them. Afterwards Sir *Harcourt* who at the making of the will was indebted to the testator in about 1000 *l.* did at the testator's desire pay in this 1000 *l.* unto the testator: After the making the will, and in the life-time of the testator, the second son of Sir *Harcourt* died, but Sir *Harcourt's* other children were then living. The lord chancellor declared, that all these legacies to the younger children were extinct, and should not be made good. *Hil.* 1725. *Rider v. Wager.* 2 *Wil. Rep.* 328. *Raymond* 335. *Swinb.* p. 7. c. 20. 447. and *Orm and Smith*, 2 *Vern.* 681. 2 *Eq. Caf. Abr.* 569. pl. 5. See *Show.* 91. *Salk.* 238.

Admiral *Littleton* having a debt due to him from one *Batson* his brother-in-law, of 300 *l.* by a codicil to his will devised to this *Batson* the money owing from him to the testator; afterwards *Batson* acquainting the testator that he would pay him his debt, the testator thereupon ordered his agent to receive the same from *Batson*, but to take no interest. The lord chancellor said, though there did not appear to be any evidence as to testator's calling in the money, yet there did not appear to have been any intention in him to forgive any thing but the interest of this debt, and that this was intended to be no more than a release by a will, which though not in strictness a release, (for it being by will, could operate only as a legacy, and must be assets, and liable to pay the debts of the testator); yet it seemed only intended as a release by his will, which intention was altered by the testator's consenting in his life-time to receive the debt himself, and the will intimated no more than that the testator's executors should not after his death give any trouble to *Batson* for this

B. owes A. a debt, A. by will give t^e debt to B. and afterwards receives it himself in his life-time, this is an ademption of the legacy.

Vent. 39.
Wil. Rep. 83.

debt; and therefore the court declared, that this legacy was extinct. *Hil. 1725. Rider v. Wager, 2 Wil. Rep. 328. 2 Eq. Cas. Abr. 569. pl. 5. See Show. 91. Salk. 238. Raym. 335. Swinb. par. 7. c. 20, 447. 2 Vern. 681.*

The testatrix having two debts due to her on bonds, devises them to M. and that if they shall be paid in the testatrix's life-time, they shall be made good to M. the testatrix releases one of them, this is no ademption.

The countess dowager of *Thomond* having two several sums of 2000*l.* each, due to her on two several bonds; the one from her grandson the present earl of *Thomond*, the other from her granddaughter-in-law the lady *Henrietta Obrian*; by will gives these two sums, and all interest for the same, to her grand-daughter the lady *Mary Obrian*, and devises away the surplus of her estate, with a proviso, "That in case all or any part of these two sums should be paid in before her death, then the said testatrix gives the said lady *Mary Obrian* 4000*l.* or so much money as the principal money so paid in should amount unto, as the case should fall out." Afterwards the testatrix in her life-time released to her grandson the lord *Thomond* the 2000*l.* so due to her upon his bond without having received any part of the money, and died: The lady *Mary Obrian* died intestate, upon which the earl of *Thomond* administered to her, and as her administrator demanded the 2000*l.* which was released to himself, and also the 2000*l.* due from lady *Henrietta Obrian*. It was objected, that the testatrix's releasing one of the bonds was a revocation *pro tanto*, it was the testatrix's own voluntary act, and not like the case where the debtor spontaneously pays in a debt; there the testator is only passive, and does no act himself. *Lord Chancellor*: The testatrix intends by this will, *inter alia*, to make a provision of 4000*l.* for her grand-daughter lady *Mary*; and though she has shewn her kindness to her grandson, this no way imports an alteration of her kindness to her grand-daughter. Suppose a testator calls in a debt, fearing it may be lost, and not liking the security, is there any reason that this should

should deprive the legatee of his legacy? The re-^{2 Williams 469.}
lease imports payment and satisfaction. The lord^{2 Vern. 681.}
Thomond claims this *in auter droit*, and as if the sister
were alive, and made her claim, it must be liable
to her debts, if she owes any, and is the same thing
as if any other person had been her administrator.
Trin. 1718. Earl of Thomond versus Earl of Suff-
olk, Wil. Rep. 461. 2 Eq. Cas. Abr. 134. pl.
23. 567. pl. 1.

The testator gave to his sister *Susanna Crockat* One having a
550*l.* which was then in Mr. *Ellis's* hands, and note for 550*l.*
made the said Mr. *Ellis* executor in trust for the payable to him or
testator's brother, and died soon after. The order, and received
testator before the making the will had left in Mr. part of it, de-
Ellis's hands 550*l.* for which Mr. *Ellis* had given vises the whole
a note to the testator, payable to him or order, and to S, the legatee
the testator had, before the making the will, shall have the
drawn some bills on *Ellis*, ordering him to pay whole, there be-
several small sums, which in all had reduced the ing sufficient of
550*l.* to 430*l.* But the testator had left in Mr. the testator's in
Ellis's hands an exchequer order for the payment drawer's hand,
of 36*l.* *per annum* to the testator for 32 years, and he being execu-
left assets for the payment of all his legacies, in- tor.
cluding the whole legacy of 550*l.* *Master of the*
Rolls: Susanna Crockat shall have the whole 550*l.*
Legacy; the payments out of it being all ordered
by the testator before the making his will, this
cannot be said to be an ademption of the legacy,
but an express indication of the testator's inten-
tion, that as the note for the full sum of 550*l.* was
still standing out, notwithstanding he had ordered
the payment of part of the note, yet he renounced
all these payments, and willed, that the whole
550*l.* should be the legacy which he gave his sister
Susanna. Trin. 1723. Crockat versus Crockat, 2
Wil. Rep. 164. See 2 Vern. 681. 2 Eq. Cas.
Abr. 569. pl. 3.

Where a Devise shall go in Satisfaction of a Thing due.

Devise of 20l. per annum no satisfaction of a bond for 20l. per Annum clear of taxes.

A Gaye a bond to *B.* her servant to pay her 20l. per Annum quarterly for her life free from taxes; and by will, without taking notice of the bond, gave to *B.* 20l. per Annum for her life, payable half-yearly, but not free from taxes. It was decreed that *B.* should have both annuities, for that by the will not being so advantageous as the first, could not be presumed a satisfaction, *Atkinson and Webb, 2 Vern. 478. Prec. Ch. 236.*

Devise of 330l. for life no satisfaction of a covenant to pay 300l.

A. on his marriage covenanted to purchase and settle a jointure of 20l. per Annum on his intended wife, and that if he died before such purchase and settlement, she should have 300l. out of his estate for her own use; the husband died before any such settlement was made, but by his will devised to his wife 330l. for her life, with power to dispose of 30l. part of it at her death. It was held *first*, that she had a right to 300l. and interest, and that the executor could not now be at liberty to settle 20l. per Annum, as the testator might have done. *2dly*, That she should have the legacy as an additional bounty and provision. *Perry and Perry, 2 Vern. 505.*

A portion of 400l. and legacy of 100l. a satisfaction for a bond of 100l. unless, &c.

Fox gives to his niece a bond to pay her 100l. after his death, and several years after he gives 400l. for her marriage portion, and afterwards makes his will, and gives her a legacy of 100l. *Cur'*, These must be taken to be a satisfaction of the 100l. upon the bond, unless it appears by the marriage articles or will, that it was to continue as a debt or charge upon his estate. *4 June 1692. Hide and Masters.*

Devise of 14l. per annum for life, a satisfaction of Securities for the like annuity.

A. upon his wife's joining with him in the sale of part of her jointure, gave a note to pay her 7l. 10s. per Annum for her life, and upon a second sale of a farther part of her jointure, gave her a bond

bond to pay her 6*l.* 10*s.* *per Annum* for her life ; and afterwards by will, without taking notice of the bond or note, devised to her 14*l.* *per Annum* for her life. It was held, that the devise should be in lieu and satisfaction of bond and note. *Brown and Dawson*, 2 *Vern.* 498. *Prec. Ch.* 240.

Sir G. C. by his marriage settlement secures 8000*l.* for daughters portions, payable at 18 if married, or at any time after when married : He afterwards by will, having but one daughter, devised her for her portion 8000*l.* viz. 4000*l.* at 18, and 4000*l.* within a year after marriage, or in all events at 21, and 200*l.* *per Annum* for life. She shall have but one of the 8000*l.* and not two portions. *Trin.* 1711. *Copley v. Copley*, *Wil. Rep.* 147. 2 *Eq. Cas. Abr.* 639. pl. 4.

Where a child has a portion by settlement and also by will, she shall have but one of them.

A. owed B. upon an open account, monies computed to be upwards of 300*l.* and by his will gave a legacy of 500*l.* to B. He gave several other legacies, and made B. his executor, and died not having made any disposition of the surplus of his estate ; B. by answer in chancery waived the benefit of the surplus, but insisted on his legacy and debt ; B. afterwards moved to amend his answer as to the surplus on the special circumstances of his case, but was denied. It was insisted, that the legacy should be a satisfaction of the debt ; that every one must be just before he is bountiful, *Debitor non præsumitur donare.* Lord Chancellor : The nature and circumstances of this debt are material ; it being upon an open account, it might not be known to the testator whether he owed the executor any money or not, and therefore could not have intended it a satisfaction for a debt which he did not know that he owed, any more than a legacy can be a satisfaction of a debt contracted after the making the will. And at another day the lord chancellor said, that as the plaintiffs would bind the defendant by his answer from taking the surplus as executor, they ought to take

A legacy of 500*l.* no satisfaction of a debt of 300*l.* due on an open account.

take it upon the terms in the answer, viz. The executor waives the surplus, but insists on the debt and legacy, and therefore decreed, that the defendant in this case should have both debt and legacy, though the legacy was greater than the debt. *Rawlins v. Powel*, *Wil. Rep.* 297. 2 *Eq. Cas. Abr.* 438. pl. 29. 491. pl. 2.

Legacy of 500l.
no satisfaction of
bond for 100l.

One being indebted to his servant maid in 100l. on a bond for wages, made his will, and thereby devising, that all his debts and legacies should be paid, gave her a legacy of 500 l. for her long and faithful services. The master of the rolls decreed the legacy to be a satisfaction of the debt; but this degree was afterwards reversed by lord chancellor King; so that the servant maid had both debt and legacy. *Chancey's case*, *Wil. Rep.* 408. 10 *Mod.* 399. 2 *Eq. Cas. Abr.* 354. pl. 18.

Legacy no satisfaction for a debt contracted after the will.

The testator gave a legacy of 100l. to the executor; the testator afterwards contracted a debt of 25l. with the executor, who was an attorney, for fees and business done: Resolved, that this debt, being contracted subsequent to the will, the legacy could be no satisfaction for the same. *Thomas v. Bennet*, 2 *Wil. Rep.* 343.

Devise of 88l. per annum in fee no satisfaction of a bond to settle 100l. per annum for life.

A man on his marriage gave a bond to the wife's trustee in the penalty of 4000l. with a condition, that if he should within four months settle freehold lands of 100l. per Annum on his wife for her life, or if his heirs, executors, &c. should within four months after his decease pay to his wife 2000l. then the bond to be void; the husband died within the four months, having by will devised freehold and copyhold lands of 88l. per Annum to his wife in fee. Decreed that the 88l. per Annum shall be enjoyed as a bounty, and not as a satisfaction of the bond, *Trin.* 1731. *Eastwood versus Vinke*, 2 *Wil. Rep.* 613. See 2 *Kel. in Chanc.* 36.

Where the testator, by making a disposition of his whole estate,

By marriage articles it was agreed, that the husband should leave the wife 800l. and her jewels, &c. and that notwithstanding the articles she

she should not be debarred of any thing he should give her by will: Afterwards the husband by will makes a disposition of his whole estate amongst his children, &c. and gives the wife 1000*l.* the wife must waive the articles or the will, she cannot take by both; for the husband making a disposition of his whole estate, shews he intended that every part should be performed. *Herne and Herne*, 2 Vern. 555.

shews his intention that it shall be a satisfaction.

By a marriage settlement the intended husband was made tenant in tail, and a provision was made to raise 3000*l.* a-piece for daughters; the husband afterwards docked the intail, and devised to the daughters 3000*l.* a-piece, and it being proved that the testator had declared, after making the settlement, that he would add to his daughters portions, and it being urged that the cutting off the intail was for that purpose, it was decreed, that the daughters should have both sums. *Pile and Pile*, 1 Ch. Rep. 199.

On proof of the testator's intention, it shall not go as a satisfaction.

The testator having three nieces, bequeathed to the eldest 300*l.* and to the other two 200*l.* a-piece: At the time of making his will he owed his eldest niece 100*l.* upon bond, and afterwards borrowed another 100*l.* and died. It was insisted upon, as a rule in equity, that where a testator being indebted, gives the creditor a legacy greater than the debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind; *aliter* where the legacy is less than the debt. *Cowper*, lord chancellor: It may be as good equity to construe him to be both just and kind, if he intended to be both; if any part of this 300*l.* be applied to the payment of the debt, for so much it is not a gift, whereas a legacy must be taken to be a gift or gratuity, and there being assets, and some proof of the testator's greater kindness to his eldest than his other nieces, the whole 300*l.* besides her debt was decreed her. *Cuthbert and Peacock*, Salk. 155. 2 Vern. 593. Vide 2 Vern. 508.

Legacy greater than the debt, on the intention of the testator, the legatee shall have both.

Thomas

The husband by will gives several annuities for lives, and makes his wife executrix; the wife by will gives annuities in fee to the same persons, some of them upon contingencies; the annuities by the wife's will shall not be a satisfaction of those given by the husband's will.

Thomas Boddington by will gave to his sister *Mary Potter* an annuity of 10*l.* and to his niece *Elizabeth*, daughter of the said *Mary*, an annuity of 5*l.* and to his niece *Mary Nichols* an annuity of 10*l.* and to her daughter *Elizabeth* an annuity of 5*l.* and to his niece *Martha Dimmock* an annuity of 10*l.* and to her daughter *Elizabeth* an annuity of 5*l.* The said annuities to be paid quarterly during the annuitants respective lives, to be paid by his wife *Elizabeth Boddington*, out of his personal estate tax-free, and made his said wife sole executrix and residuary legatee. *Elizabeth Boddington*, the testatrix's widow, afterwards made her will, thereby giving to *Elizabeth Potter*, daughter of the said *Mary Potter*, an annuity of 5*l.* to hold to her and her heirs for ever, in case she should survive her mother *Mary Potter*, and not otherwise, and gave to the said *Elizabeth Nichols*, second daughter of her niece *Martha Nichols*, an annuity of 5*l.* free from taxes, to hold to her and her heirs for ever, in case she should survive the testatrix's sister *Mary Potter*; to her niece *Martha Dimmock* an annuity of 10*l.* to hold to her and her heirs for ever; and to her daughter *Elizabeth Dimmock* an annuity of 5*l.* to hold to her and her heirs for ever; all the said annuities to be paid quarterly, and directed a sufficient sum of money to be laid out in the purchase of lands for securing the said annuities. The Question was, whether the annuities given by the will of *Elizabeth Boddington*, should be taken as a satisfaction of the like annuities given by the will of *Thomas Boddington*, they being bequeathed by her, who having her husband's personal estate, was become a debtor in respect thereof, and consequently might intend the legacies in satisfaction of such debt. *Lord Chancellor*: 1st, As to the annuities given by the will of *Elizabeth Boddington* to *Elizabeth Potter* and *Elizabeth Nichols*, these being given upon the contingency of their surviving their respective mothers, there can be no pretence

to say they shall be a satisfaction of the annuities given them absolutely by the testator *Thomas Bodington's* will. 2dly, As to the annuities given to *Martha* and *Elizabeth Dimmock* by the will of the testatrix, although they be of the same yearly value, and greater in point of duration than those given by the testator's will, yet as she has not declared that the one shall be a satisfaction for the other, I see no reason why it may not be supposed the testatrix intended to be kind as well as just to her husband's relations; and therefore he decreed accordingly. *Trin. 1729. Crompton versus Sale, 2 Wil. Rep. 553. Gilb. Chanc. 324. Eq. Cas. Abr. 205.*

By a marriage settlement a remainder was limited to daughters (in case of failure of issue male) until they should raise three thousand pounds for portions; the issue of the marriage was a son and two daughters, the father devised 700 l. a-piece to the two daughters, and died; the son by will devised to the two daughters to the amount of 7000 l. not saying in lieu or satisfaction of any thing due to them, gave the lands to his heirs male and died without issue. It was held, that the father's legacy could be no satisfaction, not being adequate in value; besides, as there was a son then living, it was uncertain whether the 3000 l. should ever become due, and it was but reasonable the father should make some provision for his daughters; as to the son's legacy, it was by two lords commissioners, against *Rawlinson*, decreed a satisfaction; but this decree was reversed in the house of lords, for the daughters being heirs at law and disinherited, there was no ground for the court to make a strained construction to their prejudice in favour of a voluntary devisee. *Duffield and Smith, 2 Vern. 258, 177.*

Legacy no satisfaction where the legatee is heir at law and disinherited.

Of Legacies limited over.

ONE *Y.* made *A.* and *B.* his executors, and devised a book called the *Graile*, to *B.* to have the use for term of his life, and after his decease the remainder to *A.* in the same manner for term of his life, and after his decease the remainder to the parish of — for ever. *Trin.* 37 *H.* 6. *fo.* 30.

Devise of a chattel personal with remainder over.

Aliter if the use only devised.

The testator devised certain goods to his wife for her life, and after her decease to *Y. S.* and died; *Y. S.* in the life of the wife, commenced a suit in the court of equity in *Wales*, to secure his interest in the remainder; whereupon a motion was made in the court of *Common Pleas* for a prohibition, which was granted accordingly, because the devise in remainder of the goods was void: The chief justice took the difference as in 37 *H.* 6. 30. *Bro. Devise* 13. and *Plowd.* 521. betwixt the devise of the use and occupation of the goods, and the devise of the goods themselves; for where the goods themselves are devised, there can be no remainder over; otherwise where the use or occupation only is devised. *March* 106. The lord *Fitzjames*, late lord chief justice of *England*, devised his lands to *Nicholas Fitzjames* in tail, with diverse remainders over, and in the same will devised diverse jewels and pieces of plate, viz. the use of them to the said *Nicholas Fitzjames* and the heirs male of his body. It was held, that *Nicholas* had no property in the plate, but only the use and occupation. *Owen* 33. *Vide Brook* 254. 13 *Co.* 5. 2 *Vern.* 254.

Devise of the use of goods for 11 years, and then to another, good.

A devise was made of the use of goods, plate, and household goods, to one for eleven years, and after to another; it was held to be a good devise, and a decree was made to deliver them over accordingly

cordingly after the eleven years. *Jolley and Willis*,
2 Ch. Rep. 137.

Tanfield Vachel devised the use of his paintings, books, &c. to his wife for her life, and willed, that if she was with child of a son, that then, after her decease, the said paintings, books, &c. should remain to the son; but if his said wife was not with child of a son, or if the son died without issue male of his body, that then the said paintings, books, &c. after the decease of the wife and death of such son, should remain to the use of *Thomas Vachel*, to have the use only during his life, and to leave them to *Thomas Vachel* his son, and that he, as far as in him lies, shall so dispose of them to him that shall succeed to the testator's lands in the county of *Berks*, to remain as an heir-loom: The wife was with child of a son, and *Thomas Vachel* the father died in the life-time of the testator. *Bridgeman*, lord keeper, and with the opinion of *Rainsford* and *Wyld* justices, held that the devise to *Thomas Vachel* the son was good in law, and that the wife ought only to have the use of the paintings, books, &c. during her life. *Vachel and Lemmon*, Ch. Ca. 129. 2 Ch. Rep. 151.

A farmer devised his stock (consisting of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff; it was objected, that no remainder could be limited over of such chattels as those, because the use of them is to spend and consume them; but the master of the rolls said the devise over was good, but said if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale, and an account was decreed to be taken accordingly. *Mich. 1702. Hayle and Burrodale.*

The testator devised in these words: And the rest and residue of my estate unbequeathed, shall be

Devise of the use
of goods for life
with remainders
over upon con-
tingencies.

Devise of corn,
hay, &c. for life,
with remainder
over.

Devise of the in-
terest to A. for
life, and if she
be

die without issue,
the principal to
M. good.

be put forth to interest by my executors, and one half of the interest shall be paid to my sister *A. C.* during her life, and the other half of the interest unto her daughter *A. S.* and she to have one half of my household goods, and after her mother's decease, to have all the interest during her life; and my will is, that if the said *A. S.* die without issue of her body, the principal of the residue shall be divided between *M.* and *F.* and such children as are or shall be born of their bodies then living. It was held, that the remainder to *M.* and *F.* was good. *Smith and Clever*, 2 *Vern.* 38, 59. *Vide* 2 *Vent.* 349. 2 *Ch. Ca.* 94. 2 *Ch. Rep.* 66, 153. *Ch. Rep.* 122, 260. *Vern.* 329. *Salk.* 156. 2 *Vern.* 600.

Devise of chattels
personal to the
wife for life, then
to the son, allow-
ed to be good.

Hyde devised his household goods unto his wife *Margaret* for her life, and after her death to his son *Joseph Hyde*. The lord keeper on the authority of late precedents which had followed the civil and canon laws, in construing the use of the thing, and not the thing itself, to pass, where the first devise is for a limited time, in order the better to comply with the intention of the testator, allowed the devise over to be good. *Pas.* 1695. *Canc.* *Hyde v. Parrat*, *Wil. Rep.* 1. 2 *Vern.* 331. *S. C.* Cited *Vachel and Vachel*, 1 *Ch. Ca.* 129. 2 *Ch. Rep.* 151. and the following cases, viz. *Anne Catchmay* made her sister *Catherine Catchmay* executrix, and bequeathed the whole estate (consisting of chattels personal) to her for life, and after her decease that (*inter alia*) 400 *l.* should be given to the daughters of *Christopher Catchmay*. *Catherine* died. It was decreed, that the daughters of *Christopher* should be paid the 400 *l.* for which *Catherine* was in nature only of a trustee, to be paid after her death. *Ott.* 26 *Car.* 2. *Canc.* *Catchmay v. Nichols*. *Finch C. R.* 116. *John Ferrers*, Esq; devised to the lady *Ferrers* for her life the castle, &c. of *Tamworth*, and also his goods and furniture, &c. in *Tamworth Castle*, and desired that

that the goods and furniture might be preserved for the heir, and appointed the lady *Ferrers* executrix: On a bill brought decreed, that an inventory should be taken of the goods and furniture of which the lady *Ferrers* was to have the use during her life, and then they were to be delivered and remain to the heir's use and benefit. 28 May 2 W. & M. Canc. *Shirley v. Ferrers*. Vide *Wil. Rep.* 144. *Tiffen v. Tiffen* 185. *Upwell v. Halsley*.

Of Devises to charitable uses.

BY the statute 43 *Eliz. c. 4.* the chancellor, &c. is empowered to appoint commissioners under the great seal, &c. to inquire by the oath of twelve men, &c. of all gifts, &c. of lands, goods, &c. for relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free-schools and scholars in universities; for repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; for education and preferment of orphans; for relief of stock, or maintenance of houses of correction; for marriages of poor maids; for the support, aid and help of young tradesmen, handicraftsmen and persons decayed; for the relief or redemption of prisoners or captives, and for aid and relief of poor inhabitants in payments of taxes, and to inquire of the abuse and misapplication of such charities, and to make orders for the due application of such charities; which orders are to stand in force until altered by the lord chancellor, &c.

An impropriator devised to one that served the cure, and to all that should serve the cure after him, all the tithes and other profits, &c. though the curate was incapable of taking by this devise in such manner for want of being incorporate and having succession, yet it was held, that the heir

Devise of a charity to a curate and his successors, his heir shall be seized in trust.

T

of

of the devisee should be seised in trust for the curate for the time being. 2 *Vent.* 349.

Devise to a company in trust for a charity.

A devise of lands to the company of leather-sellers in *London*, to maintain a charitable use there, was upon an appeal to the lord chancellor held good, notwithstanding the statute of wills prohibiting the devising to a corporation in *Mortmain*; and it was said, that there were several precedents of the same kind. *Duke's Charitable Uses* 80.

Devise to a college to find a scholar.

Dr. Flood devised lands to the principal, fellows and scholars of *Jesus College* in *Oxford* and their successors, to find a scholar of his blood from time to time. It was held, that the devise was void in law, because the statute of wills did not allow devises to corporations in *Mortmain*, but yet that it was within the relief of the statute of charitable uses 43 *Eliz.* under the words *limited* and *appointed*; and so it was decreed, that the college should enjoy the lands. *Griffith Flood's case*, *Hob.* 136.

Devise to a college to maintain a fellow.

Lands were devised to *Trinity College* in *Cambridge* for the maintenance of a fellow there; and if any cavil should hinder this devise, or that the same cannot go to the college by reason of the statute of *Mortmain*, then he devised the same to *S. S.* and his heirs. Upon an information exhibited by the attorney general to have this land established in the college; it was decreed accordingly, notwithstanding the said statute and the latter clause in the will. *The King and Newman*, *Lev.* 284.

Superstitious uses.

An inquisition having found that one *A.* had devised to *J. S.* and her heirs absolutely, without any trust; that she did it for the good of her soul, and that the devisee owned that the estate was not hers, but belonged to God and his saints. The court of *King's Bench* held, that this could not be averred to be a superstitious use, by reason of the statute of frauds and perjuries; and said, that a monk may take now by purchase, and seemed

seemed to think so of a nun: But an information being preferred in the exchequer, and an application of the devise to a use truly charitable; it was held, that the statute of frauds could not bind the king; but he, as head of the commonwealth, is intrusted and impowered to see that nothing be done to the disinherison of the crown, or the propagation of a false religion, and in that case intitled to pray a discovery of a trust to a superstitious use, and that this being a superstitious use, the king may order it to be applied to a proper use. *The King and Lady Portington, Salk. 162.*

A. being a beneficed clergyman, devised 600*l.* to Mr. Baxter, to be distributed by him to sixty pious ejected ministers, and adds, that he did not give it them for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want; he also gave to Mr. Baxter 20*l.* and 20*l.* more to be laid out in a book of his, intitled, *Baxter's Call to the unconverted*. It was held by North, lord keeper, that this was a superstitious use, which though void, yet the charity is good, and shall be applied in eodem genere, and therefore decreed it for the maintenance of a chaplain for Chelsea college. *The Attorney General and Baxter, 1 Vern. 241.* But this decree was reversed, 1 *W. & M.* by the lords commissioners. 2 *Vern. 105.*

Devise of 600*l.* to be distributed amongst sixty ejected ministers.

A. devised a salary for maintenance of independent lectures in three market towns, and devised the estates thus charged to his nephew, who afterwards devised it for the payment of his debts; a bill was brought to have the lands sold for payment of the debts; and afterwards, upon an information for the charity, the growing payments and arrears were decreed, and the independent lectures changed into catechistical lectures in the same three market-towns, and this, though there was not sufficient to pay the debts. *Combe's case, 2 Vern. 267.*

Devise of a salary for maintenance of three independent lectures.

Devise to a charity as directed by writing, the writing not being found, the king shall appoint.

A. having devised one thousand pounds to be applied to such charitable uses as he had by writing under his hand formerly directed, and no such writing being to be found, it was held that the king should appoint, who gave it to the mathematical boys in *Christ's Hospital*, which was decreed accordingly, and that the parties should be indemnified from the writings referred to. *The Attorney General and Syderfin, 1 Vern. 224.* If a charity is devised to the poor indefinitely, the king shall have the disposal of it. *Nalf. Ch. Rep.*

As he shall if to the poor indefinitely.

Tenant in tail may devise to a charity.

245.

Tenant in tail may devise to a charity, and such devise shall be good though there was neither fine nor recovery. *Duke's Char. Uses 110. 2 Vern. 453.*

But an infant feme covert or lunatic cannot.

But if an infant, lunatic or feme covert do by will or by deed give any thing to a charitable use, it shall be void. *Duke's Char. Uses 110.* A devise to a charity by a feme covert administratrix, was held good. *Damus's case Moor 822.* But the law is otherwise now.

Churchwardens capable of lands by devise to a charitable use.

If lands are given to churchwardens of a parish to a charitable use, although the devise be void in law, they not being a corporation capable of taking in succession, yet they shall be capable for this purpose. *Duke's Char. Uses 82.*

Remainder of lands devised to a church, the parson shall have it.

Lands were devised to *A.* for life, remainder to the church of *St. Andrew* in *Holbourn*; it was held, that the parson of the church should have the remainder. *Duke's Char. Uses.*

Copyhold devised to a charity, good without a surrender.

If copyhold lands are devised to a charity, they shall pass without any surrender, and shall bind the heir, but the lord shall not lose his fine. *Duke's Char. Uses 110.*

Will devising lands to a charity, must have 3 witnesses.

A man devised lands to a charity, but the will was not executed in the presence of three witnesses according to the statute of frauds, 29 *Car. 2. c. 3.* It was held that the will being void, should not

not operate as an appointment. *Attorney general v. Bernes*, 2 Vern. 597. *Salk.* 163.

If lands are devised to a corporation by a wrong name, as to the mayor and chamberlain instead of the mayor and commonalty, yet as the intent of the devisor appears, it shall be good. Mayor of London's case, *Duke's Char. Uses* 83.

Devises of lands to a corporation by a wrong name, good.

John Palmer by will gave 50*l.* to the parish of Great Creaton (where he was born) without saying to what use; the ministers, churchwardens, and overseers of the poor, exhibited their bill for this legacy: Upon producing a decree made 30 June 1657. *St. John's College v. Plat, Finche's Ch. Rep.* by *Nelson*, fo. 221. where, upon the advice of four judges, it was resolved that upon an original bill the chancery might relieve within the statute of charitable uses: It was decreed, that the 50*l.* should be paid as far as the defendant had assets, and the money disposed for the benefit of the poor of the parish. *West against Knight*, 1 Ch. Ca. 134.

Money devised to a parish shall go to the poor of that parish.

Money was given for the good of the church of Dulk; it was resolved to be a good gift notwithstanding the general words. *Duke's Char. Uses*.

Money given for the good of the church of D.

The testator being seised of a manor of the yearly value of 240*l.* devises several legacies, and particularly to his heir at law 40*s.* devises further thus: That being determined to settle for the future after the death of himself and his wife, the manor of F. with all lands, woods and appurtenances, to charitable uses; he devises to A. B. &c. upon trust, that they shall yearly and for ever, pay several particular sums to charitable uses, amounting in the whole to the sum of 120*l.* per Annum, and gives the trustees something for their pains; there being an overplus, it was decreed to go in augmentation of the charities, it appearing to be the testator's intent to settle the whole manor, and that his heir should have no more than the 40*s.* *Arnold and The Attorney General, Shower's Parliament Cases* 22.

The testator having a manor of 240*l.* per Ann. and intending to give the whole to charity, the whole shall go, though he appointed only to the amount of 120*l.* per Ann.

What shall pass
by a devise of rent
to a charity.

By a devise of the rents of lands, or of the rents and profits of lands to a charitable use, the lands themselves shall pass. *Duke's Char. Uses* 112. If a man having made a lease of his lands, devises the rent to a charity, this shall be construed largely for the rent then reserved, or afterwards to be reserved, or an improved value. *Duke's Char. Uses* 71.

No lands, &c.
nor money to be
laid out in lands,
&c. to be given
to any bodies
politic for
charitable uses;
unless, &c.

No manors, lands, advowsons or other hereditaments, nor any money or other personal estate, to be laid out in lands, &c. shall be given to any bodies politic or otherwise, or any ways charged in trust for charitable uses, unless such gift (other than stocks in the public funds) be made by deed indented, in the presence of two witnesses, twelve calendar months before the death of such donor, and be inrolled in chancery within six calendar months after execution; and unless such stocks be transferred six calendar months before the death of such donor, and unless the same be made to take effect in possession immediately from the making, and be without power of revocation. Stat. 9 Geo. 2. c. 36. sect. 1.

Not to extend to
purchase for a
valuable con-
sideration.

Nothing herein relating to the sealing and delivery of any deed twelve calendar months before the death of the grantor, or to the transfer of stock six calendar months before the death of the grantor, shall extend to any purchase for a full and valuable consideration. *Same Stat. sect. 2.*

Gifts to the con-
trary void.

All gifts of lands, &c. or of any charge affecting lands, &c. or of any stock or personal estate to be laid out in lands, &c. for charitable uses, which shall be made in any other manner, shall be void. *Same Stat. sect. 3.*

Not to extend to
gifts to either
university, &c.

This act shall not make void dispositions of any lands to either of the universities, or the colleges or houses within either of them, or the colleges of *Eaton, Winchester, or Westminster*, for the better support of the scholars upon the foundations. *Same Stat. sect. 4.*

There

There was a devise to charitable uses under a will in 1734. the testator lived till July 1736, a month after the new statute [9 Geo. 2. c. 36.] of Mortmain took place, and then dies without revoking his will: It was referred by the court of chancery to the judges for their opinion, whether this was a good disposition to charitable uses; and all of them, except Mr. justice Denton, who was ill, certified that the devise to these uses was good in law, notwithstanding the act; and thereupon lord chancellor Hardwicke declared the will should be established, and the trusts of the charity carried into execution. *Asbburnham v. Bradshaw*, 2 Atk. Rep. 36. pl. 23. *Barnard. in Chanc.* 6.

A devise to charitable uses under a will in 1734, the testator lives a month after the new statute of Mortmain took place; all the judges except Mr. justice Denton, certified that the devise was good in law.

Where collateral Evidence shall be allowed to explain, confirm, or contradict a will.

THE constant rule of law has been to reject all parol proof brought to supply the words of a will, or to explain the intent of the testator, and that nothing *dehors* should be averred, is the express resolution in lord Cheyney's case, 5 Co. 67. And this rule has since been thought necessary to be adhered to, not only on account of the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence and uncertainty, but because little regard ought to be had to the expressions of the testator either before or after the making his will; because possibly those expressions might be used by him on purpose to disguise what he was doing, or to keep the family quiet, or for other secret reasons, which cannot after his death be found out; but this rule has received a distinction which has greatly prevailed of late, *viz.* between evidence offered to a court, and evidence offered to a jury; for in the last case no parol evidence is to be admitted, lest the jury should be inveigled by it; but in the first case it can do no hurt, being to inform the

Of admitting collateral evidence.
2 Bac. Abr. 309.

conscience of the court, who cannot be byassed or prejudiced by it. *Vide 2 Vern. 98, 337, 625.*

Testator having charged his real estate with debts and legacies, proof admitted of the testator's intention that his executrix should have the personal estate clear.

The earl of *Gainsborough* devised his real estate to his nephew, chargeable with the payment of his debts and legacies, and made his lady executrix, who brought a bill to have the personal estate discharged from the debts and legacies, alledging that the creditors threatened to come upon the personal estate, and averring, that it was the intent of the testator that she should have the same clear to herself, and that the instructions for making his will were so; but that either by the mistake or contrivance of the person who drew the will, it was not so expressed: The defendant demurred, for that no such averment ought to be admitted against the will in writing; but the demurrer was over-ruled, and it was said, that such an averment could not be admitted where it was to make the party a title, yet where it was only to rebut an equity, as in this case; and the case of *Crompton and North*, 1 *Ch. Ca.* 196 was cited; where Mrs. *Crompton* devised her lands to Sir *Henry North*, to be sold for payment of her debts, which were very small, and the heir would have the surplus a trust for him: The court was of opinion, that Sir *Henry North* might be admitted to prove Mrs. *Crompton's* intent otherwise; and also the cases of *Kingsmill* and *Ogle*, *Foster* and *Munt*, and *Pring* and *Pring*, 2 *Vern.* 99. were cited. On the hearing of the cause it plainly appeared in proof, that the testator's intention was, that the executrix should have the personal estate clear of the debts and legacies; whereupon it was decreed accordingly; and that if it was taken from her by the creditors, she should come in as a creditor upon the real estate. *The countess of Gainsborough* against *The earl of Gainsborough*, 2 *Vern.* 52.

Parol evidence admitted to prove the testator in-

The testator devised to his wife some particular legacies, and made her executrix, but made no disposition

disposition of the surplus of his personal estate: tended that his
The court admitted parol proof to shew, that executor should
the testator intended her the surplus, being to have the surplus.
oust an implication or rule in equity, and on the
evidence decreed for the wife. 2 Vern. 648, 736.
Parol proof admitted to shew, that a legacy
greater than a debt due to the legatee, was not in
satisfaction of the debt. 2 Vern. 593, 594.

The testator devised all his household goods, as
woollen, linen, pewter and brass *whatsoever*, ex- Proof to explain
cept a trunk under the chamber window. The the testator's
person who drew the will was admitted to explain meaning in a be-
these words notwithstanding the statute of frauds quest of goods.
and perjuries; for here it neither adds to, nor
alters the will, but only explains which of the
meanings shall be taken; as where a testator de-
vises to his son *John*, having two sons of that
name; here the word *as* may be a restriction, or if
the following words be as particular instances, it
may not restrain the word *whatsoever*; the lord
keeper inclined to think that the testator intended
thereby all his household goods, and the proof was
read. *Pendleton and Grant*, 2 Vern. 517.

A. devised to B. lands of 60 l. per Ann. paying Proof to make
100 l. which he owed to J. S. and 100 l. more certain a person
which he owed by bond to J. N. and after some described.
small legacies, bequeathed the surplus of his per-
sonal estate to his nieces; it happened that the
100 l. by bond was not due to J. N. but to S. H.
and therefore the devisee of the land refused to
pay it, insisting, that it ought to be paid out of
the personal estate; the person who drew the will
swore the testator intended the debt due to S. H.
whereupon it was decreed, that the devisee of the
land should pay this debt; the lord chancellor
saying, he saw no hurt in admitting collateral
proof to make certain the person or the thing
described. *Hodgson and Hodgson*, 2 Vern. 593.

The testator having three daughters, several
grandchildren and great grandchildren, devised the
surplus of his estate to be equally divided amongst
his

Proof to explain
the testator's in-
tent of who shoul
take.

his three daughters, and all his grandchildren and great grandchildren who should be living within two years after his death, and died; within two years after his death other grandchildren were born: Depositions to prove the testator's intent that none born after his death should take, were admitted to be read; but the witness only swearing that the testator said so or so, or to that effect, the lord keeper said it signified nothing, for that would make the witness the judge; he ought to set down the very words, that the court might judge of them; but it was held, that without this proof, the words *within two years after my death*, were to be taken restrictively, and extended to none born after. *Trin. 1700. Dayrel and Moleworth.*

Parol evidence admitted to prove what heir intended by a will.

Talbot Barker being seised in fee of a real estate as heir on the part of his mother's mother, and also of a small estate of 4 *l. per Annum* as heir to his own father, devises all those lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which he devises the residue of the rents and profits of the premises, to his own right heirs of his mother's side for ever: And the question was, who should be intitled to the residue of the rents and profits, whether the heir of his mother's father, or the heir of the mother's mother? It was insisted that parol proof should be read to explain the testator's intention; to which it was answered, that though parol proof might in some cases be allowed as to personal estates, as 1 *Vern.* 30. yet in the case of land there ought not to be parol proof. 2 *Vern.* 621. *Lord Chancellor*: In this case parol evidence of what the testator said or directed, when he ordered the will to be made, may be admitted, as 5 *Co.* 68. *Paschæ* 1723. *Harris v. The bishop of Lincoln*, 2 *Wil. Rep.* 135. 2 *Eq. Cas. Abr.* 333. pl. 4. 367. pl. 9. 416. pl. 11. 499. pl. 22. 2 *Mod.* 10. Parol proof is not admitted to contradict the words of a will. *Lowfield v. Stoneham*, 2 *Str.* 1261. *Brown v. Selwin.* *Cas. Temp. Talb.* 240. Witnesses.

Witnesses have been examined to prove the testator's intent. *Cliffe & al. v. Gibbons & al.* 2 *Ld. Raym.* 1326.

All the words of a will are to be construed to answer the intent of the devisor; but this is to be understood in cases where the intent of the party may be known by the words that are in the *Will*. 2 *Andr.* 10, 11, 134. *Bur. Rep.* 233.

That if there are inconsistent and contradictory words in a will, some words must be rejected to make it sense. Thus where a testator gave the interest of a sum of 6000*l.* to *Mary Comfortle* his daughter for her life, and after her decease gave the money between *Charles Comfortle* her husband, and their children: And in another part of the will he said, and in case there be no such child or children, I give it to *Charles Comfortle* and such children—Lord chancellor *Hardwicke* rejected these latter words, as they were absurd and contradictory. 5 *Bac. Abr.* 525.

A. having a wife and no children, made his will, and said, lest it should please God that he should not return, he gave and devised a real and personal estate, or to that effect. He returns, has children, and dies, without altering his will: The plaintiff being a legatee, and there being a direction in the will, for the sale of the real estate to pay his legacy; lord chancellor *Hardwicke* was of opinion, that the disposition was merely contingent, and that no part of the will was to take effect but on the contingency of his return; and so avoided determining the principal question, how far the alteration of the testator's circumstances would be a presumptive revocation as to the real and personal estate; but as to the personalty, seemed to rely on the case of *Lug and Lug*; and as to the real estate, he said, that the statute of frauds and perjuries made a material difference between that and the personal estate. *Parsons v. Lenox*, 5 *Bac. Abr.* 525.

C H A P. V.

Of the Revocation of a Testament or Last Will; Of Land; Of Chattels; By making a later Testament; By cancelling; By alteration of the Testator's Circumstances; Of Republication.

Of the Revocation of a Testament or Last Will.

In what manner
a will in writing
of lands may be
revoked.

NO devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or by his directions in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses declaring the same. *Stat. 29 Car. 2. c. 3. §. 9.*

In what manner
a will in writing
of goods or chat-
tels may be re-
voked.

No will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any word, or by will by word of mouth only, except the same be in the life-time of the testator committed to writing, and after the writing thereof read unto the testator, and allowed

allowed by him, and proved to be so done by three witnesses at the least. *Stat. 29 Car. 2. c. 3.*

§. 22.

One by will duly executed and attested by three witnesses, who subscribed the same in his presence, devised lands to trustees to several uses: He afterwards made another will of the same lands, devising to other trustees, but to the same uses; and there was a clause in this last will revoking all former wills; but in this last will, though subscribed by the testator and attested by three witnesses, yet the witnesses names were not subscribed in the testator's presence. It was observed, that there was a diversity betwixt the penning the two clauses in the statute of frauds, the clause §. 5. relating to a devise of lands, requires that the *witnesses must subscribe in the testator's presence*; but the clause §. 6. of revoking former wills, does not require them to do so; and the case of *Eccleston and Speak*, 3 *Mod.* 258. and *Show.* 89. was cited.

One makes a second will of lands to other trustees, but to the same uses, and revoking former wills, but the witnesses do not subscribe in his presence, the devisees shall take by the first will, though it be cancelled.

Lord Chancellor: I allow of the case of *Eccleston and Speak*, in regard there the second will devised the lands to the same person to whom they had been devised by the first will, and therefore it may be truly said, that the second will did not intend to revoke the former, but rather to confirm it. A second will devising lands to the same persons as the former, and revoking all former wills, and this subscribed by three witnesses, but not in the testator's presence, shall never revoke the former will so as to let in the heir; nay, if by the latter will the premises had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give to the second devisee what was taken from the first, without any consideration had to the heir, and if the second devisee took nothing, the first devisee lost nothing; or if the first will had been cancelled by the testator's directions, upon a presumption that the second devisee was to take the premises

by the second will, such cancelling should not have profited the heir, because it would have been a cancelling proceeding from a mistake: It is no more than if the testator being sick, and having two wills under his pillow, should, by mistake, give his last will to be cancelled; or order one to cancel his first, who, by mistake, cancels his last; and so in the principal case, though the first will was ordered to be cancelled, and the same was in fact cancelled accordingly, yet all this being upon a presumption that the latter will was good, and duly executed, it is properly relievable under the head of accident; wherefore let the heir be joined, and the first devisee hold and enjoy. In this case it was said by Sir Thomas Powis, and not denied by any, that if a man, having two duplicates of his will, cancels one of these duplicates with an intention to destroy his will, this is a good revocation of the whole will, and of both the duplicates; and that this was Sir Edward Seymour's case. *Hil. 1716. Onions versus Tyrer, Wil. Rep. 343. 2 Vern. 741. Prec. Chanc. 459. Gilb. Rep. 130. 10 Mod. 467. Eq. Cas. Abr. 407. pl. 1.*

Cancelling the Duplicate destroys the will.

If a man revokes or cancels either the original will or the duplicate of his will, it is an effectual avoiding of both, both being but one will, and must stand or fall together. *2 Vern. 742. sed vide Swinb. p. 7. §. 16. p. 4.*

Tearing off the seals from a will, if not done animo cancellandi, is no revocation.

The testator made his will in writing, and thereby devised all his real and personal estate to his wife, her heirs and executors, in trust, to pay his debts and legacies; and then devises several legacies to his children and other persons, and concludes thus: *In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof to be left in the hands of A. B. set my seal to every sheet thereof, and to the last of the said sheets my hand and seal in the presence of three witnesses; and this will was attested according*

ing to the statute; afterwards the testator being minded to add other trustees to his wife, and to make some little alterations in his will, sent for a scrivener, and gave him directions to prepare a draught of instructions for another will, which the scrivener did accordingly; and the testator having read and approved the same, set his hand to it: and thinking he had made a new will, takes the first will out of his pocket, and tears off the seals from the first eight sheets; whereupon the scrivener asked him what he was doing; he said he was cancelling his first will; but the scrivener desiring him to desist, for that the other will was not complete, and would not pass the real estate for want of being executed according to the statute 29 Car. 2. c. 3. he said he was sorry, and immediately desisted, and soon after died without having done any thing further as to the perfecting the second will or cancelling the first. The spiritual court held the last will to be good, as to the personal estate, and admitted the wife, who was executrix of that will, to prove it. The legatees and trustees in the first will brought a bill in chancery to have a specific performance of the trusts in the first will, and to have the estate sold pursuant to the directions of that will. The lord chancellor held, that the subsequent will could be no revocation, as to the real estate, not being executed according to the statute of frauds and perjuries, and that as to the tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation, and that the seal remaining whole to the last sheet was sufficient, and in strictness it was not necessary that all the sheets should be sealed; but because the spiritual court had sentenced the second a good will of the personal estate, the lord chancellor held it a good will for the whole personal estate; that such personal legacies in the first will as are left out in the second, must be lost; but those legacies that are given

A second will not executed according to the statute, is no revocation of the first as to a real estate.

Two wills, one for the real and one for the personal estate.

Eq. Caf. Abr.
409. pl. 3. See
Comm. Rep. 455.

given by the first will, and charged on the real, if they are given also by the second will, they shall continue chargeable on the real estate, unless they are enlarged by the second will; for though the second will was not of itself sufficient to charge the real estate, yet since the real estate remained well devised by the first will, they should still be secured by the real estate, for they were not devised out of land like a rent, but only secured by land which was well devised before: As for other new absolute personal legacies devised by the last will, they should be chargeable only on the personal estate, but should have preference to be first paid out of the personal estate, before other legacies in the first will charged upon the real estate, because they had their several funds out of which they were to be paid. *Hil. 6 Annæ, Hyde and Hyde, 3 Ch. Rep. 155.*

Teffator makes a lease for 1000 years in trust, and devises it to pay debts and legacies, then borrows 1000l. and pays his debts, and for security leases the same lands for 1000 years, this no revocation.

Walter, tenant for life, with power to make leases for any number of years, with remainders over to others, makes a lease to trustees for performance of his will, and makes his will, and appoints several debts and legacies to be paid by the trustees, and afterwards borrows 1000l. of *A.* with which he clears his debts, and for security of this 1000l. he leases the same lands to *A.* for 1000 years, and dies; and the question was, whether the remainder-man or the legatees should redeem; for it was objected, that the lease to *A.* was a revocation of the will, and so the first lease now is only to attend the inheritance. *Finch*, lord chancellor: If one devises in fee, and after leases for years, this is only a revocation *quoad* the term; so here the security to *A.* is but a revocation *quoad* the debt; and when that is satisfied the legatees ought to be let in, and so the trustees for them may redeem. 22 November 1682. *Perkins and Walter, Vern. 97. S. C.*

Lands charged by will with portions and main-

Sir Thomas Vernon by will charges the manor of *Hodnet* and lands with portions and maintenance for

or his daughters, and gives 2000*l.* to his lady upon condition that she release her dower on re-quest: After this, to secure a debt of 8600*l.* to Mr. Savile, he levies a fine to J. S. wherein his lady joins, and this in trust to be sold for payment of the 8600*l.* and the remainder to be in trust for him and his heirs, and dies. *Cur'*: This surplus, whatever it is, must be subject to the will, and the lady and daughters to be paid, and what remains to go to the heirs: If the surplus be not sufficient, then the mother and daughters to have in proportion; and if to have it raised out of the profits, then they to go hand in hand, and no preference in payment. 10 November 1691. *Vernon and Jones*, 2 *Vern.* 291. *S. C.* In this case, *Hall and Dench*, 2 *Ch. Rep.* 297. *Vern.* 329, 342, was cited, where *A.* devised lands to *B.* and afterwards mortgages the same lands to J. S. *B.* shall have the redemption.

If a man devises lands to another in fee, and afterwards mortgages the same lands for years or in fee, though a mortgage in fee be a total revocation at law, 1 *Roll. Ab.* 616. yet in equity it is only a revocation *pro tanto*. *Vern.* 329, 342, 97, 141, 182. *Salk.* 158.

A. seised in fee, devises to *B.* in fee, or for life, and afterwards leases to *C.* for years; this even at law shall be no revocation but during the term, for it does not appear that the testator intended it further. *Mountague and Jefferys*, *Roll. Ab.* 616. 2 *D. A.* 528. p. 3. 529. p. 4. 530. p. 2. 531. p. 1, 2, 4. 533. p. 5. *Moor* 429. *Poph.* 108. *Godol.* 57.

The testator possessed of a term for forty years, devised to his wife, and afterwards leases the same land to another for twenty years, and dies. It was held, that this lease was no revocation of the whole estate, but only during the twenty years, and that the wife should have the residue by the devise. *Wilcox and Kent*, *Roll. Ab.* 616.

Testator devises in fee, and after leases the same lands to the devisee for 60 years, to commence from the testator's death, this is a revocation.

Coke devised his land to his sister in fee, and twelve years after let the same land by indenture to the said sister for sixty years, to commence after his death, and delivered the deed to a stranger to the use of his sister, which stranger did not deliver it to the sister till after the death of the deviser, and she never agreed to it, but claimed by the devise. This was held to be a good revocation of the whole estate, for both those estates cannot stand in her to begin at one time; whereby his intent appears to be altered, and to give her a less estate: But by all the justices, except *Walmsley*, if such a lease had been made to a stranger, it had not been any revocation for the term; but *Walmsley* held, that in regard it is an intire devise, it is a revocation for all; but a devise of a manor, and after a lease or a devise of part thereof to another, is no revocation for the residue, for they are several, and may be severed; but in the principal case they all agreed that it is a revocation, for the estates cannot stand together; but if it had been made to her to begin presently or futurely in his life-time, that had not been any revocation, for it might have determined in his life-time, and have well stood with his will. *Coke and Bullock, Cro. Jac. 49. 2 D. A. 532. p. 5.*

Devises for 99 years, if three persons live so long, and then leases for 99 years if three persons live so long, rendering rent, no revocation.

The testator devised to his youngest son a mesuage for 99 years, if three lives lived so long, yielding and paying to his sister 20*l. per Annum* until she was twelve years of age, and afterwards 40*l. per Annum* for her life. The testator afterwards, for 300*l. fine*, demised the said mesuage to *J. S.* for 99 years, if three lives lived so long, yielding and paying 50*l. per Annum* to the testator, his heirs and assigns. The Master of the Rolls held this to be a revocation; but the Lord Keeper, on an appeal, decreed it to be no revocation, and that the daughter should be paid her annuity; and he said, that the rule is, that where a subsequent act shall amount to a revocation by implication,

it must be a necessary implication, and the act must be wholly inconsistent with the devise.

Lamb and Parker, 2 Vern. 495.

Edward earl of *Lincoln* mortgaged the manor of *S.* to *Wynn* in fee for 12000*l.* and afterwards by his will, in default of issue male of his own body, devised it to Sir *Francis Clinton* (who was to succeed him in the honour) for life, with remainder to his first and other sons in tail male, with other remainders over, and appointed that his household goods at his chief house at *S.* should remain there as heir-looms to the next heir male who should be earl of *Lincoln*, and made Sir *Francis Clinton* executor. Afterwards the earl (who was very whimsical) took a fancy to one Mrs. *Calvert*, daughter of lord *Baltimore*, and fancied he should marry her (though it was proved in the cause, that there never was any intention of such marriage in her or any of her relations, nor any treaty), and thereupon makes a lease and release of the premises to *Davenport* and *Townshend* and their heirs, in consideration of such marriage (as it was expressed) to the use of himself and his heirs till the said intended marriage took effect, then as to part in trust for Mrs. *Calvert* and her heirs in lieu of dower; and as to the rest, in trust to be sold to discharge that part settled on Mrs. *Calvert*, and the surplus of the money to his executors and administrators; there was no further progress towards this marriage, and soon after the earl died, and the honour descended to Sir *Francis Clinton*. A bill being brought, the question was, who had a right to redeem, the heir of the late earl, or the present earl as devisee? For the heir it was insisted, that the will is to the disinherison of the heir, who is always favoured; that as to mortgages having been held no revocation in equity, the reason is, because mortgages are not considered as conveyances of the estate, but only as charges upon it; the lord keeper was of the same opinion, and de-

The testator devises land, and after upon a proposal of an intended marriage, which never took effect, settles the same by lease and release; this a revocation.

creed for the heir at law of the late earl; and this decree was affirmed in the house of lords. *Earl of Lincoln and Rolls, Shower's P. C. 154.*

Testator devises his estate, a subsequent settlement by lease and release, held a revocation.

Sir *John Huband* by will in writing devised several pecuniary and specific legacies, and then gave all the rest of his real and personal estate, after debts and legacies paid, to *John Pollen* in tail, on condition that he took the name of *Huband* upon him: Sir *John Huband* afterwards by lease and release conveyed his real estate to trustees in fee, to the use of himself for life *sans waste*, remainder to such uses as the said Sir *John* by any writing under his hand and seal, or by his last will and testament should appoint; soon after this Sir *John* died without altering or revoking his last will, or making any appointment touching his real estate. It was held, that this lease and release was a revocation of the will. *Mich. 1712. Pollen and Huband, Wil. Rep. 751.*

Testator devises lands to A. and afterwards in his life-time settles part of the lands on A. this is no revocation as to the residue.

The testator having issue four daughters, but no issue male, devised his lands in trust to permit his daughter *S.* to receive the rents and profits until her death or marriage, and if she married with consent of the trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons: Afterwards the testator's daughter *S.* marrying with his consent, he settled part of the lands on her and her husband, and died. It was held, that this settlement was no revocation of the will as to the devise of the other lands. *Clarke and Berkeley, 2 Vern. 720.*

Per Hardwicke, lord chancellor: The general principle is, that at the time of the devise, the deviser must have a disposing capacity, and an estate in the land devised; and the estate must remain in the same plight and condition until his death: For the least alteration by any act of his, makes it a different estate, and shews a different intention, and therefore is an actual revocation. Thus if

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one seized in fee devises, then in feeoff another, to the use of himself in fee, though it is the old use that remains, yet it is a revocation, though it is his on the feoffment. So if a bargain and sale without inrolment. So if a man thinking himself tenant in fee devises, and then apprehending himself to be only tenant in tail, suffers a recovery, with intent to confirm his will, it is a revocation. As to mortgages, they are exceptions out of the rule. At law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto* only; and the reason is, that a mortgage is only a security; and though it be a conveyance of a real estate, yet in this court it is a chattel interest only, and goes to the executor, and it gives no dower. In the case wherein these leading principles were established, after the testator had devised all the manors, lands, tenements, and hereditaments, he by a deed conveyed an advowson which he was seised of at the time of making his will, to, and to the use of trustees and their heirs; in trust to present the church when void to a particular person, if qualified, on the terms prescribed therein: And if such person should be incapable, then to present such clerk as *A.* should nominate; and in default of nomination by him, as the trustees should think fit. The person intended was presented; and on a bill brought by the heir at law of the testator, to have a legal conveyance of the residue of the advowson; the question was, whether this deed, being only a trust for a particular purpose, as it was alledged, was a total or partial revocation? And determined by lord chancellor, after arguing as above, that it was a total revocation; it being a grant of the legal interest; and the trust was a real and beneficial interest given by it to the trustees, that of nominating themselves in default of *A.*'s nominating: And he decreed a conveyance to be made according to the prayer of the bill. *MSS. Rep. Sparrow v. Hardecastle, 5 Bac. Abr. 527.*

Testaments, Last Wills, and Executors.

So where a testator devised by his will, a leasehold estate under *Magdalen college Oxon.* and, after the making of his will, before his death, renewed his lease by surrendering the old one, and taking a new lease. Determined by lord chancellor, that this was a revocation of his will. And though the testator after the renewal, looking among his papers, and said this is my will, that was held to be no republication. *MSS. Sir Thomas Abney v. Miller, 5 Bac. 527.*

J. S. on his marriage with *F.*'s daughter, settled 500*l. per Annum* on her; he afterwards surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife. Afterward *J. S.* on the death of his wife's father, became intitled to 1500*l.* in right of his wife; then *J. S.* levied a fine, and made a new settlement, and increased her jointure 300*l. per Ann.* but never altered his will. And *per* lord chancellor, the settlement is a revocation of the will, for such lands as are comprized in it; but the copyhold is not, and therefore passes by the will. *Lannoy v. Lannoy, Sel. Cas. in Chanc. 48. 5 Bac. Abr. 537.*

By marriage articles it was agreed, that the wife's lands, whereof she was seised in tail, should be conveyed to the husband in fee; they married, the husband made his will and devised these lands; then the husband and wife suffered a recovery of these lands, to such uses, and for such estates, as they should jointly appoint, and in default of such appointment, to the use of the husband and his heirs. She died without appointing. *Per Hardwicke*, chancellor: This amounts to a revocation of the will, and in this case the following rules were laid down.

If a man seised in fee devises, and then makes a conveyance by fine, scoffment, or recovery, and takes back a new estate, it is certainly a revocation; and so if he takes back the old use unaltered,

ed, from a presumption that he could not have made such a conveyance, without an intention to alter his will : But if after making his will he had made a lease, or charged it with a sum of money, &c. it would have been only a revocation *pro tanto*. The rules are the same in the devise of a real and of a personal estate; with regard to charges made afterward : But if a man, having an equitable estate in fee, devises it, and then takes a conveyance of the legal estate ; it is no revocation. The equitable estate will not pass by will, but the heir at law, by descent of the legal estate, may become a trustee for the devisee, who may call for a conveyance of the estate. If a man contracts by articles for the purchase of lands, and before a conveyance, devises the lands and dies ; the devisee shall have the lands, and call for a conveyance from the vendor. If a man seised of a legal estate, makes his will, and then conveys the legal estate to another in trust for himself, it is a revocation. If in this case the husband had only taken the legal estate by the recovery, to execute it into the equitable estate, it would have been no revocation ; but new uses are appointed, and tho' the wife died without making any appointment, that will not alter the case ; for here he took the fee by the recovery differently qualified, subject to different conditions, differently conveyed. But if two parceners make partition, levy a fine, and declare the use, that will not be a revocation, because it is to effectuate the partition. *MSS. Rep. Parsons v. Freeman, 5 Bat. Abr. 538.*

J. S. devised all his real and personal estate to trustees, A. B. and C. their heirs, executors, and administrators, in trust, to pay 15*l.* *per Annum* to the plaintiffs (his two sisters) for their lives, and after several legacies, the surplus in trust for the dissenting ministers at Reading, &c. and gave 300*l.* to each trustee, and 20*l.* *per Annum* to each, while they took care in executing the trust. After-

ward, by lease and release of subsequent date to the will, the testator conveyed all his real estate unto and to the use of the said *A. B.* and *C.* and their heirs, with a proviso to be void on payment of 10*s.* But *J. S.* kept both the deeds in his own custody, and soon after died: And the said *A. B.* and *C.* obtained administration *cum testamento annexo* as trustees. The trustees for some years paid the 15*l.* *per Annum* a-piece to each of the testator's sisters; but afterward refused to continue the payment thereof, and also refused to pay any of the dissenting ministers, but kept the rents, &c. to their own use. The two sisters (the heirs at law) and their husbands, brought their bill against the surviving trustee, insisting, that the deed of conveyance of the real estate, and the deed of gift of the personal estate had revoked the will, and that there was a resulting trust for them, as heirs at law; or at least that they (the sisters) were intitled to their 15*l.* *per Annum* annuities. Defendant insisted on plaintiffs having forfeited their annuities by bringing their bill, there being a clause in the will, that if (the sisters) disputed the will, then they should forfeit their annuities. Lord chancellor Talbot decreed, that the annuities should be paid to the two sisters, with the arrears and growing payments thereof; but the surplus was decreed to go to the dissenting ministers. *MSS. Rep. Lloyd & Ux. & al' v. Spillet & al,' 5 Bac. Abr. 541.*

Sir John Wobrych by will, in August 1722, devised his estate to trustees for the term of 200 years, for payment of all his debts; in December following he devised the same to other trustees for 300 years, in trust to pay some particular debts by specialty mentioned in the deed, and all other incumbrances that affected the estate. In June 1723 he died; and the question was, If the deed in December was a total revocation of the 200 years term? And at the Rolls both terms being held to be consistent, the plaintiff now brought a bill of review;

review; and *Talbot* lord chancellor was of opinion, that the deed in *December* was intended only as a collateral security, for payment of the debts therein mentioned, and such others as were a charge on the estate; and that *Sir John* did not depart from his former intentions of paying all his debts, but only to give preference to those comprized in the 300 years term, who by law were preferred to the simple contract debts; and therefore he declared, that so much of the 200 years term should be sold as would satisfy the purposes of the deed; and afterwards the 200 years term should commence. *MSS. Rep. Weld v. Aston, &c. 5 Bac. Abr. 541.*

A man makes a will, and by it revokes a former will. The only proof of the execution of this latter will was, by three witnesses, who did not see him sign or seal it, but upon their being called in, he acknowledged it to be his hand-writing and seal, pointing with his finger to the will; upon which they attested it. Two questions arose: 1. Whether considering this as an original will, it is well executed. 2. If it is, whether it be well executed as a revocation, because by the statute it ought for this purpose to be *signed in presence of the witnesses*. By the lord chancellor *Hardwicke*: As to the former question, if this had been *res integra*, it would have been a matter of doubt with me; but it is *res adjudicata*, and must now be taken as decisive. All the cases, where an attestation by three witnesses at different times is held good, are authorities in point; for they must all be founded upon the proof of this very fact, the acknowledgment of the testator that it was his hand-writing. It could not be a different execution before each witness, for then there would be three executions, and the act would not be complied with, as it requires three witnesses to one execution: And as to the *sealing*, putting any thing on the seal, as a finger, *animo signandi*, is good enough.

enough. But he seemed to think that sealing was not *signing* within the statute, contrary to the *obiter* opinion in *Lemain and Stanley* (3 *Lev.* 1.)—As to the second, he said, that the words *signed in the presence of three witnesses*, refer to the next preceding words [*other writing*] only, and not to a will or codicil; and so it was determined (3 *Mod.* 218.) in the case of *Hoyle and Clarke*. *Ellis v. Smith*, 2 *Burn's Eccl. Law* 584.

Where a legacy in writing becomes void in the lifetime of the testator, and he by a nuncupative codicil, bequeaths the same, this no revocation, but a new will as to that.

Of a revocation of a testament relating to chattels only.

A man by writing devised the *residuum* of his personal estate to his wife, and afterwards she dying, he by a nuncupative codicil bequeathed to *J. S.* all that he had given to his wife. It was held, that by the death of the wife the devise of the residue was totally void, and the codicil was no alteration of the former will, but a new will for the residue. *T. Raym.* 334.

We have herein in some measure seen the opinion of the courts in *Westminster-hall* as to the revocation of a will where lands or tenements are devised; but the revocation of a will which concerns only goods and chattels, is properly examinable in the ecclesiastical court: We will shortly consider what will be a revocation of a will relating to goods and chattels only by the ecclesiastical law, but at the same time the reader must remember what shall be a revocation of such will by the statute 29 *Car.* 2. c. 3. *antea* fo. 284.

A testament may be revoked, 1. By making a second testament. 2. By revoking and cancelling the testament made. 3. By alteration of the testator's condition and circumstances.

Of revoking a testament by making a later testament.

A man may as often as he will make a new testament; this power remains until the last breath, and there is no legal means to hinder him from it; but no man can have two testaments, (that is, of a personal estate, for we have before, fo. 287, 288. in the case of *Hyde and Hyde*, seen that a man may have

have one for his real and another testament for his personal estate); and therefore the last only is of force, and maketh void the former.

The latter testament infringes the former, tho' there be no mention in the second testament of revoking the former; and the latter testament will make void the former, although the testator should have made an oath not to revoke the same, the oath being revoked together with the testament; but the latter doth not revoke the former when the latter is imperfect in respect of the testator's will, and not in respect of solemnity: The later testament doth not make void the former, when it is greatly suspected that the testator was compelled to make the later testament by fear or violence, or that he was induced to make the later by fraud or deceit; the later testament being made at the interrogation or suggestion of some other person, especially when the testator is very sick *in extremis*, doth not make void the former, unless it plainly appear to be the express will of the testator to revoke the former, and unless the testator himself dictated the later testament, or unless the later testament be in favour of the testator's children, or others who were intitled to the administration of his goods in case he had died intestate: If the testator having made two testaments at different times, and the testator being sick upon his death-bed, some presenting both testaments to him, should ask which of them he would have stand for his testament, and the testator, being of perfect mind and memory, should deliver the former testament, this testament so delivered shall be the testator's last will though first made: When the later testament doth not dissent from the first, but agreeth with the same in all points, it shall not revoke the former, especially if the second was made shortly after the first, for they seem to be but one testament in several writings: If there be no executor named in the later testa-
ment

ment it noth not revoke the former, for then it is but a codicil: The later testament doth not revoke the former, if it be made in heat of anger and displeasure conceived by the testator against the executor of the first testament, if they be afterwards reconciled and become friends: A testament made with a clause derogatory of all future wills and testaments, as if the testator should say, *whatsoever testament I shall hereafter make, I will that the same shall be of no force*, is not always infringed by a later testament, unless there be a sufficient mention or revocation of the former testament or clause derogatory. Of clauses derogatory there be two sorts, the one derogatory of the power of making testaments, the other derogatory of the will of making testaments; *e. g.* Of the first sort, when the testator useth these or the like words, *I do from henceforth renounce the power of making any other testament*; or thus, *I will that hereafter I have no more liberty or authority to make more wills or testaments*; *e. g.* Of the second sort, when the testator useth these or the like words, *If I make any testament hereafter, I will that the same be of no force*; or thus, *If I make any testament hereafter, except wherein I write the Lord's Prayer, my mind and will is, that the same be void and of no effect*. If the clause be derogatory of the power or liberty of making testaments, and the testator afterwards maketh another testament, it is not necessary to make therein any mention or revocation of the former testament, or of the derogatory clause therein contained; for the clause derogatory of the power of making a testament is utterly void in law, and a man cannot renounce that power. If the clause be derogatory of the testator's will, then it is necessary that in the latter testament there be mention or revocation of the former testament, with the clause derogatory, otherwise the former testament will remain in force; the reason is, because there is presumed a defect in the testator's will

will in the second testament, and that his meaning is not to have the former revoked without making mention of the former derogatory testament; but it is not always true that the testament, containing a derogatory clause of the testator's *will*, is not infringed by a later testament, wherein there is no mention or revocation of the former testament derogatory; as when it is proved by other conjectures, that it was the testator's meaning that the former testament should be revoked; or when there is ten years expired from the time of the first testament, or when the second testament is made in favour of the testator's children, or some other person intirely beloved by him, or when the executor in the first testament does afterwards greatly offend the testator. There be three sorts of revocations, one *general*, another *special*, and the third *singular* or *individual*; *General*, when the testator in his later testament useth these or the like words, *I will that this testament shall stand notwithstanding any other will or testament by me heretofore made; or thus, I revoke and make void all former wills and testaments*; *Special*, when the testator useth these or the like words, *I do hereby revoke all former testaments, notwithstanding a clause derogatory in the same*; *Singular*, when the testator says, *I make my last will and testament, notwithstanding that clause derogatory in my former will, that I would not have that testament revoked, or unless I should insert in this testament the Lord's Prayer*; or thus, *notwithstanding that clause derogatory in my former will, whereby I would, that no will or testament afterwards to be made should prevail, although I should specially derogate from the former*; or thus, *notwithstanding that will wherein I made such a person my executor*; or thus, *notwithstanding that will that I made at such a place, and before such witnesses, &c.* If in the later testament there be a *general* revocation, as notwithstanding all former testaments, &c. a former testament containing a clause derogatory of the testator's *will*, is not thereby

thereby taken away, though there be but one former testament. If in the second testament there be a *special* revocation, as notwithstanding any testaments with their clauses derogatory, &c. a former testament that contains a derogatory clause will be taken away. If in the second testament there be a *singular* revocation of the former testament, as notwithstanding such a testament made before such a notary, &c. such former testament having a general clause derogatory, is thereby sufficiently revoked, though the second testament do not mention the derogatory clause contained in the former testament. If in the former testament there be a special clause derogatory, and the second testament makes a general mention of the former testament of the clause derogatory, the former testament is revoked; but it is otherwise if the second testament do not mention the clause derogatory. If in the former testament there be a special clause derogatory circumscribed with certain limits; *e. g.* *I will that this testament shall stand notwithstanding any other to be made hereafter, unless in the same I write, or cause to be written, the Lord's Prayer*; this former testament may be taken away by a later testament, although the Lord's Prayer be not written in the same, but then the later testament should not only mention the former testament, but also the clause derogatory, as *I will that this later testament shall stand notwithstanding any former testament by me made containing whatsoever words or clauses derogatory*. When clauses derogatory are found in any testament, the person of the testator is to be considered, whether he be such a person as understands the nature of a derogatory and revocatory clause, and also the occasion of inserting such a clause, whether it was inserted by the sole motion of the testator, or at the instigation and persuasion of some other, as the executor, legatee, attorney, &c. for if the testator understood the nature and effect of such a derogatory clause,

clause, and voluntarily inserted the same of his own accord, it is to be presumed he did it least he might be solicited by the instigation and importunity of kinsfolks, to change and revoke his will contrary to his settled purpose; in which case the former testament is not easily revoked; but if the testator was a simple person, and ignorant of the nature and effect of a derogatory and revocatory clause, and if such clause be inserted by the attorney at the request of such who profit by the will, and are unwilling it should be revoked; then, howsoever the former testament be fortified with cunning clauses of inserting the Lord's prayer, and the like, in the second testament, or of not revoking the former testament, although in the second he should expressly revoke the same; the same may be easily revoked without any such precise observation of special revocation.

It is lawful for every man who has made a testament to revoke the same and to die intestate; ^{Of revoking testaments.} but no man is presumed to have revoked his testament once made, unless the revocation be proved; though a man lives forty years after he has made a testament, it is not presumed to be revoked by the length of time, even though during that time his wealth and substance have greatly increased, and though the testament be to the prejudice of such as would be intitled to the administration of his goods; and if these circumstances concur and attend one testament, the same is not presumed to be revoked: If the testator, after the making his testament have a child born, I apprehend it is not to be presumed, that the testament is thereby revoked, especially if the testator lived a long time after the birth of the child, and might have revoked the testament, and did not; *vide Eq. Ab.* 413. p. 15. *Brown and Thompson, et postea* 307. If he that is appointed executor or legatee doth, after the making the testament, become an enemy to the testator, or doth him some great injury;

injury; or if the testator, upon heat of anger or displeasure conceived without just cause against his son, or other persons who would be intitled to the administration of his goods, if he had died intestate, make his testament in favour of others, and afterwards (the heat of his passion being extinguished) they be reconciled; in these two cases the testament is presumed to be revoked. If the testator, being *in extremis*, and afraid to die, doth bequeath some legacies *ad pias causas*, and afterwards recovers his health, the legacy is then presumed to be revoked; this seems to me to be odd doctrine for an ecclesiastical court; but I apprehend this, and some other of the ecclesiastical laws on this head, above recited, are comptrolled by the statute 29 *Car. 2. c. 3. §. 22. antea fo. 284.*

Cancelling.

If the testator cancels or defaces his testament, the same is thereby adjudged void; this rule extends to nuncupative wills, afterwards reduced into writing; as if a man make a nuncupative will, then cause the same to be reduced into writing, and afterwards voluntarily cancels or cuts the same writing, or otherwise defaces it, such testament is void, as if it had been written at the beginning, neither is it of any use to prove the same by witnesses; for though the writing does not appertain to the substance of the testament, yet by the cancelling the testator is presumed to have altered his mind; but in some cases the cancelling or defacing the testament shall not make the same void. 1. Where the testament was cancelled by the testator himself unadvisedly, or by some other person without the testator's consent, or by some other casualty. 2. When the testator, after he hath voluntarily pulled away the seal, doth seal the same again. 3. When the whole testament is not cancelled or defaced, but some part of it only erased, blotted, or put out; for the other parts of the testament remain firm as they did before, although the erasement, &c. be in the chief part
of

of the testament, as the appointing the executor. *Vide Burkit and Burkit, 2 Vern. 498.* 4. When there are several papers or writings of one tenure, each containing the whole testament, the defacing or cancelling of some of them doth not hurt the testament, unless it was proved that the testator's mind was contrary; *sed vide 2 Vern. 742.* 5. When the testament is lost either in the testator's life-time or afterwards, for so much thereof as may be proved by witnesses is still in force. If the testament is found cancelled or defaced, but it is not known who cancelled or defaced it, the person in whose custody the testament is found so cancelled or defaced, is to be adjudged to have done the act, whether it be the testator or another: If the testament was kept in such a place as not only the testator but others might have access to it, the cancelling is rather to be ascribed to the testator than to any other.

Alteration of the testator's state and condition may be a means of making the testament void which in the beginning was good, and that alteration may happen divers ways, especially if the testator, after making his testament, is attainted of a crime for which the law would have deprived him of the power of making a testament; and such crimes are treason, felony, and the like. Captivity will also overthrow the testament; but if the captive recover his former liberty, then the testament made before his captivity recovers its former force: If he that is attainted of treason or felony obtain the king's pardon, with restitution to his former state, then the testament made before such conviction is likewise revived, and in both cases the testament is good without any new confirmation or declaration: But in this the two cases differ, that the testament of the person who recovereth his former liberty, is good even from the beginning, as if he had never been captive; but the testament of him who being attainted of

Alteration of the
testator's state
and condition.

treason or felony is pardoned, and himself restored, is of force only from the time of restitution ; and if the pardon do only import a remission of the penalty without restoring the party to his former state, the testament still remains void. There are two times when it is necessary that the testator have ability to make his will ; the one is, *the time of making the testament*, at which time the testament receives its substance and being ; the other is, *the time of the death of the testator*, when it receiveth its strength and efficacy ; (as for the time betwixt the making the testament and the death of the testator, it does not signify whether the testator had any such power or not) ; and if a person being attainted of some crime does, whilst he is intestable, make his testament, and afterwards obtains his full pardon, with full restitution, the testament is nevertheless void, because of the original defect.

If a feme sole makes a will, and afterwards takes a husband, this without more, as was resolved in the case of *Forse and Hembling*, 4 Co. 60. doth work a revocation or adnullation of the will, for that else it should be irrevocable, since she having lost the freedom of her will, cannot actually and directly make a revocation. If a man being of sound mind and ability make a will, and after becometh lunatic, this is no revocation, and the will stands till his death irrevocable if he recover not.

Alteration of the testator's circumstances a revocation of his will.

One being single made his will, and devised all his personal estate to J. S. afterwards he married and had several children, and died without other will or disposition ; and now *coram delegatis*, of which *Trevor Ch. J.* was one, It was ruled, that there being such an alteration in his estate and circumstances, so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the

the same mind. *Mich. 8 W. 3. Lugg versus Lugg, Salk. 592.*

J. S. being a bachelor, made his will and devised a legacy of 500*l.* to his brother, and other legacies to other persons, and devised his real estate to *Elizabeth Close* and her heirs, and afterwards intermarries with the same *Elizabeth Close*, and died, leaving her *privement ensient* with a son, without making any alteration in his will. The question was, whether this alteration in the testator's circumstances did of itself, without more ado, amount to a revocation of the will. The lord keeper was clear of opinion, that alteration of circumstances might be a revocation of a will of lands as well as of a personal estate; and that notwithstanding the statute of frauds and perjuries, which does not extend to an implied revocation; but no such alteration appears here, for no injury is done to a person, and those are provided for, whom the testator was most bound to provide for; and so established the will. *July 1702. Brown and Thomson, Eq. Cas. Abr. 413. pl.*

The master of the rolls mentioned a case [*Eyre versus Eyre*] that he remembered to have been adjudged, where a man made a will and appointed J. S. (who was no relation) his executor; afterwards he went beyond sea, where he became governor of one of the plantations, and sent over for an *English* woman of his acquaintance, whom he married and had children by, and died without any actual revocation of his will; yet it was determined, that this total alteration of the testator's circumstances was an implied revocation of the will; and in affirmance of this Sir *Joseph Jekyl* cited this case from the civil law, *Pater credens filium suum esse mortuum, alterum instituit heredem; filio domi redeunte, hujus institutionis vis * est nulla.* Wil. Rep. 304.

* Vide Cic. de Oratore, Cantab. Ed. p. 69, 102. et Dig. L. ult. de Hered. Inst.

Testaments, Last Wills, and Executors.

A subsequent devise to a person incapable of taking, is a revocation of a precedent devise to a person capable; this was approved by the counsel on both sides as good law. *Roper v. Radcliffe*, 10 *Mod.* 233.

Devise of lands to *A.* if afterwards the devisor devises the same lands to *B.* a papist, both devises are void; for though the last is void as a will, yet it is good as a revocation. *Roper v. Constable* 8 *Vin. Abr.* 141. pl. 2.

Of the Republication of a Last Will or Testament.

Of republication.

A Testament that is revoked may be revived again divers ways; as first by a codicil afterwards annexed; as was resolved in the case of *Beckford and Parnecot*, *Cro. Eliz.* 493. or by adding any thing to the will, or making a new executor, &c. If a man having made a former will, which is more than a bare revocation, yet if afterwards lying upon his death-bed, and speechless, both these wills be delivered into his hands, and he is desired to deliver to one of his friends about him the will which he would have to stand, and to keep in his hands the other, and he thereupon delivers the first will, retaining in his hand the later, the former will, though made void many years before by the later is revived, and shall stand as the party's will. 44 *Ed. 3. fo.* 33. A bequest that is at first void, may by a republication become good; as if a man gives to *Sarah* his wife a piece of plate, or the like, and hath no such wife at the time of making his will, but afterwards marrieth one of that name, and then republishes his will, this shall be a good bequest; so if a man devises lands or goods which he has not, if he afterwards purchases the same, and then says, that his will made before shall stand, or be his will, and

and re-executes it according to the statute, it shall be a good will, for this in effect is making a new will. Though most of the precedents be of a revocation of particular parts of the will, and not of the whole; yet first it is to be considered that that part so revoked was in effect the substance of the will: Next it is easily discerned, that if one part be revocable, so is another also; and thus revocation may spread itself over the whole; nay doubtless the whole may *uno flatu* be revoked as well as by parts, even as a faggot may be put at once into the fire as well as stick by stick; and as the disposing parts of the will are revocable and revivable by new publications as aforesaid, so is also the constitution of executors; as, if one of the executors names be struck out, and afterwards a *Stet* be written over his head by the testator or by his appointment, he is a revived executor.

If a man devises certain lands, and afterwards *aliens* the lands to a stranger, and after that repurchases them, and then shews his intent that the said will should continue in force, this is a new publication, and the land shall pass by the devise. 44 E. 3. 33. 2 R. 3. 3. Vern. 330.

After a devise the testator sells the land, and then repurchases it, and says the will shall stand.

The testator's saying his will was in a box in his study, was held to amount to a new publication. Cotton and Cotton, 2 Vern. 209.

My will is in my study, is a new publication.

If a man devises all his land to *J. S.* and afterwards purchases the manor of *D.* and after that writes in his will that *J. D.* shall be his executor, this is not any new publication to make the land pass. 1 Rol. Abr. 618. But if after the purchase of the manor of *D.* he delivers the aforesaid will as his will, and says that it shall be his will, without putting any words thereto, this new publication shall pass the new purchased lands. Rol. Abr. 618. Salk. 237.

Where by a new publication after purchased lands, shall pass.

A man seised of lands in *D.* and having issue four daughters, viz. *A. B. C.* and *D.* by will in writing devised all his lands in *D.* to his two daughters

Adding a codicil, &c. a sufficient republication to pass after purchased lands.

daughters *A.* and *B.* and made them his executors; he afterwards purchased other lands in *D.* and then one *J. S.* came to the testator and requested him to sell him those last purchased, but he said he would not, for his intent was, that those lands should go with his other lands in *D.* to his executors; after this the will being read to him he said nothing thereunto, but caused a codicil to be writ, in which there is a devise of several personal things, as corn, and implements of household, and annexes the codicil to his said will, and died without any other publication. It was held, that this was a sufficient publication to pass the new purchased lands, for there needed no other words in the will than there were before, and his intent appears that it should be his will by annexing the codicil. *Beckford and Parnecot, Rol. Ab. 618. 3 D. A. 533. p. 8. Cro. Eliz. 493. Godol. 307. Sed vide Moor 404. Goldf. 150. al contra.*

Devise in tail, the devisee dies in the life-time of the testator, he makes a codicil, this no new publication to carry the land to the issue,

A man having issue two daughters *A.* and *B.* devised lands to *A.* and the heirs of her body, and for want of such issue to *B.* in the life-time of the testator *A.* died leaving issue; afterwards the testator annexes a codicil to his will, and thereby disposes of part of his personal estate. It was held, that this did not amount to a republication of his will, nor give any title to the issue of *A.* though the testator had declared in his will, that *B.* had married against his consent, and that what he had given her was in full of her portion, and in bar of any further part of his real estate, *Hutton and Simpson, 2 Vern. 722.*

Whether renewing a lease devised is a revocation, and adding a codicil a republication.

If a man devises a lease to his daughter, afterwards renews the lease, and after that adds a codicil to his will, without taking any notice of the will; whether the renewal of the lease is a revocation? and whether the adding the codicil is a republication? *vide 2 Vern. 209. and Altham's case, antea fo.*

A man had issue four sons, viz. *A. B. C.* and *D.* and devised lands to *B.* and the heirs of his body, and after his death without issue, to *C.* in tail, and to *A.* in tail, the remainder to the right heirs of the devisor: *B.* died in the life-time of the testator, leaving issue *F.* and *W.* afterwards the testator said, *My will is that the sons of B. shall have the lands devised to their father as they should if their father had lived, and died afterwards.* The devisor died, *F.* entered, *A.* the eldest son entered. It was resolved in this case, that the new publication is a new will, and that *F.* should take the land as a purchaser. *Fuller and Fuller, Cro. Eliz. 422. Moor 353. Godolph. 57. 2 D. A. 534. p. 9. 538. p. 1, 2. Moor* says the court was divided in opinion.

Whether a parol declaration shall amount to a republication after the death of devisee in tail?

J. S. had two sons *William* and *Robert*, and *Robert* has issue a son named *Robert*; *J. S.* devises land to his son *Robert* and his heirs, and by the same will gives his grandson 50*l.* and *Robert* the son dies; afterwards *J. S.* by parol re-publishing this will says, *Robert my Grandson shall take by my will as Robert my son should have done*; yet the grandson shall not have the lands, for lands cannot pass, but by will in writing, and his son *Robert* cannot import his grandson *Robert*, especially when by the same will he has made a distinction between son and grandson. *Strode and Berager, 2 Lev. 243.* The judgment to the contrary, given by three justices against the opinion of *Scroggs* in the *Common Pleas*, is said by the reporter to have been reversed in the *King's Bench* (as he heard), though it was argued, that the words of the will were proper enough to pass the lands to the grandson, for the addition of grand only imported a distinction between the father and son whilst living; but that the father being dead at the time of the republication, the grandson might properly be described by the name of a son. *T. Raym. 408. Vent. 341. 2 Mod. 313. 2 Jon. 135. Mod.*

Devisee of land dying, testator by parol declares that the devisee's son shall take as his father should have done.

267. 3 Keb. 845. 2 Show. 63. 2 D. A. 534.
p. 10.

It has been said, that if a codicil be executed after making a will and purchasing lands, it will amount to a republication, and pass the lands purchased after making the will, and that it was so determined by all the judges in the case of *Acherley and Vernon*, which see *P. Gibson v. Rogers*; but quære unless it appears that the testator had his real estate under consideration. 5 Bac. Abr. 516.

A. having given a legacy *inter alia* to his son *Joseph*. *Joseph* died, and he afterwards had another *Joseph*, and then by a codicil to his will confirming his will, he took notice, that since the last, it had pleased God to give him another son, and gave him a smaller legacy. Determined that this was a republication of his will, and amounted to a substituting a second *Joseph* in the place of the first; and gave him the first legacy as well as the second. *Perkins and Micklethwaite*, 5 Bac. Abr. 516.

It was determined, upon the opinion of all the judges, that if a will be made, and afterward another will without cancelling the former; and then by an act subsequent to both, the first will be confirmed, the limitations in that will so confirmed will take place: And also that if there are two inconsistent wills of the same date, neither of which can be proved to be last executed; they are both void by the common law for uncertainty, and will let in the heir at law: And also that although the wills are dated the same day, the limitations may take place if they are consistent in both, to the disinherison of the heir at law; And upon this opinion the order appealed from, which was a dismissal of the plaintiff's bill in the court of the exchequer in *Ireland*, was confirmed in favour of the lord *Anglesey*, by the house of lords. Vide the printed copy. *Philips v. Anglesey*, 5 Bac. Abr. 517.

C H A P. VI.

Who may be Executors ; Of the appointing an Executor ; By what words ; How he may be limited in a special Manner ; Executor being a Legatee ; Executor being a Debtor or Creditor to Testator ; What Acts an Executor may do before Probate ; Refusal of the Executorship ; Of the Probate Of wills ; of Bona Notabilia ; The face and effect of the Probate ; To what time the Probate or Refusal shall relate.

Who may be Executors.

THE testator, although he hath children, ^{Femes covert, infants and corporations.} may appoint other persons to be his executors, secretly omitting or publickly excluding his own children ; he may appoint a feme covert or an infant his executor ; nay even an infant in the womb and unborn at the death of the testator : He may appoint one person alone, or many representing one body ; as a college, a city, or university. *Swinb. p. 5. sect. 1.* A mayor and commonalty may be executors, *12 Ed. 4. 9. b. sed quare, & vide Office of Executors*, where this matter is doubted.

One that is attainted of treason or felony cannot ^{Traytors and felons.} be appointed executor, *Nam cum sit damnatus ad mortem naturalem, mortuo æquiparatur, & sic non potest institui.* *Swinb. p. 5. sect. 4.*

He

Outlaws.

He that is outlawed, so long as he standeth in that case, is not to be admitted to the executorship, nor can he sue for his legacy, except it be in such cases as he may make his testament, whereof mention has been made before. *Swinb. p. 5. sect. 5.*

Excommunicated persons.

Although an excommunicated person may be appointed executor, and is capable of a legacy; yet so long as he is under the sentence of excommunication he is not to be admitted by the ordinary. *Swinb. p. 5. sect. 6.*

In the office of executors, said to be wrote by judge *Dodderidge*, it is held, that persons attainted, convicted, outlawed, or excommunicated, may be executors; but probably the difference is, where the attainder, conviction, outlawry, or excommunication, happens after the party has proved the will, for then it will not work a nullity of the executorship; but if the attainder, &c. is before the probate, I apprehend the ordinary may legally refuse to admit the party: It is there also said that an excommunicated person being executor cannot proceed in a suit till absolved, there being danger of excommunication to all that converse with him. *Vide 1 Inst. 134.* The executors are disabled if one of them only is excommunicated. *3 Lev. 208.*

The king.

When the king is made executor, he appoints certain persons to take the execution of the will upon them, against whom such as have cause of suit may bring their action, and appointeth others to take the account; and so it was done when *Katharine* queen dowager, mother of *H. 6.* made her will and appointed him executor thereof. *4 Inst. 335.*

Feme Popish recusant.

By the statute *3 Jac. 1. c. 5.* a married woman being a popish recusant convict (her husband being none) that doth not conform according to the direction of that act by the space of one year before her husband's death, shall not be capable of being

being executrix or administratrix to her husband, and enjoy any of her husband's goods.

And by the same act a popish recusant convict Popish recusants. shall not be executor or administrator.

Of the appointing an Executor.

THE very name of an executor purports in general, that he is a person to whom the execution of something is committed or recommended, and in this particular case the executor of a testament is one to whom the execution of the testator's will after his death is committed; therefore a testament is the only instrument by which an executor can be created; where there is no testament there is no executor; and on the other side, though there be a writing in the name of the testament, and therein many legacies are bequeathed, and many things appointed to be done, yet if no executor be named, there is no testament; a testament and an executor are so relative and reciprocal, that there cannot be one without the other; if there be no testament there is no executor; if there be no executor there is no testament; but this rule is to be taken with these two cautions. 1. That if a man's mind, will and intent, touching the disposition of his goods, be declared, although for the want of appointing an executor he dies intestate, so as administration is to be committed; yet as here is not only an inclination of a testament, but such a progress therein as the manifestation of the deceased's mind and intention, this being notified to the ordinary, is usually annexed to the letters of administration as a direction to the administrator, as well as where there is a perfect testament, and the executor refuses to act. 2. Where a man by will in writing devises lands and tenements, this is good for the whole, though no executor, so as the party dies

dies intestate, and administration is committed as touching his goods, and yet hath a will as touching his lands; and the reason of this is an act of parliament enabling a man to dispose of his lands by his will in writing, (*vide antea* fo. 287. the case of *Hyde and Hyde*, where a man left two wills, the one held good for his real, and the other for his personal estate) and land is not properly testamentary, neither hath the executor (if any be) any thing to do with it; therefore in a devise of lands the making or not making an executor is of no consequence.

The sole making an executor, without bequeathing any legacies or appointing any thing to be done by the executor, will amount to a good testament; for the principal part of the executor's office is the payment of the testator's debts; the very making an executor is constituting a person who is to pay all debts, and for that end he is to have all the testator's goods, chattels and debts; the naming a man executor is by implication a gift to him of all the goods, chattels, credits, and personal estate of the testator, and the laying upon him an obligation to pay all the testator's debts, and making him subject to every man's action for the same; and as the law says this, *quod necessario subintelligitur non deest*, if a man's effects will but satisfy his debts, the bequeathing a legacy is to no purpose, for it is void, and therefore in such case the appointing an executor is of itself sufficient.

By what words an Executor may be made.

THOUGH a man do not expressly by his testament name or appoint any one to be his executor, yet if by any words or circumlocution he commit to any one the charge and office which belongs to an executor, it amounts to as much as the constituting him to be his executor; as if the testator

testator by his testament declares, that *Richard Roe* shall have his goods after his death to pay his debts, and otherwise to dispose of them at his will and pleasure, or to that effect; by this *Richard Roe* is made executor; and so it would have been if he had only said, that *Richard Roe* should have the administration of his goods. 21 H. 6. 6, 7. If a man by his testament gives divers legacies, and then appoints, that his debts and legacies being paid, his wife shall have the residue of his goods, so as she give security for the performance of his will; by this, without more she is executrix: Also if a man make an infant his executor, and *A.* and *B.* Overseers, with this, that they shall have the rule and disposition of the goods, and payment and receipt of his debts until the full age of the infant; by this they are executors in the mean time. If the testator make *A.* his executor, and afterwards in his testament says, that *B.* shall administer also with *A.* and in aid of him, here *B.* is an executor as well as *A.* and if *A.* refuse, *B.* alone may prove the will as executor; but if *A.* is made executor, and *B.* a coadjutor without more saying, he is not by this an executor with *A.* 21 H. 6. 6, 7.

How an Executorship may be limited and qualified in a special manner.

AN executor may be appointed to commence at a future time after the testator's death, and that either at a certain time or at an uncertain time, depending upon some contingency: He may be created conditionally, and the executor's power may be limited as to a particular part of the goods, as to place and time.

A man may appoint *John Doe* to be his executor a year or more after after his death, this is good; so if the testator appoint his son to be his executor when

One appointed to be executor a year after the testator's death,

or when he shall
come of age.

Executors made
conditionally.

when he shall come to his full age, and in the mean time he dies intestate. If one appoint the executors of *A.* to be his executors, if he dies before *A.* he is intestate till *A.* dies. *Vide Plowd.* 275.

The testator appointed *A.* and *B.* his executors, and if they would not take it upon them, then *C.* and *D.* should be his executors; *A.* and *B.* refused; and the question was whether in an action against a debtor of the testator, *A.* and *B.* should join with *C.* and *D.* as where four executors are named, and two refuse, and the other two prove the will, yet all four must join in an action; but it was resolved, that the suit should be only in the name of *C.* and *D.* for the appointing them to be executors, if *A.* and *B.* refused, did imply that then they only should be executors; all four were never intended to be executors, but *A.* and *B.* upon a condition subsequent that they should not refuse, and *C.* and *D.* upon a condition precedent, viz. if *A.* and *B.* refused. 3 *H.* 6. fo. 6. b. It is usual to make one or more executors conditionally, that they put in security to pay legacies, or in general to perform the will, in which case the condition should be expressed thus: If *J. S.* do put in security, &c. by such a day, then he shall be executor, else not; or thus, to make him executor conditionally, that before he do administer (funeral excepted) he put in such security; else perhaps, he being executor till the condition broken, may in the mean time have disposed of all, or the greatest part of the testator's estate. One willed, that if his wife suffered *J. S.* to enjoy *Blackacre* (being perhaps part of her jointure) for three years, then she should be his executrix, or else *A. B.* should; and the question in the *Common Pleas* was, whether presently before the end of the three years the wife was executrix, or not till she suffered the land to be enjoyed three years? It was the opinion of all the judges, except *Anderfon*, that she was presently executrix

until

until she should disturb *J. S. &c.* for upon that being done it was agreed, that the executorship would, by virtue of the condition, be transferred from the wife to *A. B.* *Pas. 33 Eliz. Alice Francis's case. Jennings and Gower, Cro. Eliz. 219. Leon. 229. 2 D. A. 18. p. 19.* But during these three years, she might have disposed of all the goods of her husband, and then broken the condition, and left *A. B.* a dry executorship. *Barton* makes a will, and bequeaths several legacies to his children, and makes *John* his son and *Mary* his wife executors, to whom, after the debts and funerals paid, he gives all the residue of his estate, and desires that his wife may continue in her widowhood; but if she marries again, then he appoints another of his sons to be executor with his son *John* in her stead: She married again, and after brings a bill to have an account of the residue, to have the moiety of it. The master of the rolls was of opinion, that the bequest of the residue was annexed to the executorship, and that she having determined it by her marriage before the residue was known and stated, has lost her legacy, and it goes to the other son that succeeds her; and the case of *Wilkinson* was cited, where *Wilkinson* makes his will in this form: I give all my estate to my brother *John*, whom I make my executor; afterwards he marries, and then by a writing reciting, whereas I have formerly made my will and appointed my brother my executor, now I do hereby constitute and make my wife my executrix. It was held, that this revoked the devise of the estate to the brother, for else she would have nothing but the trouble and burthen of the executorship, whereas he intended her a benefit by making her executrix; and so would the other son in this case, if he was not to have the benefit of the residue which was given to the executors. Also the case of *Cutler and Coxeter, 2 Vern. 302.* was remembered, where the deviser gives the *residuum* of his personal estate to his executrix, and dies indebted

indebted by mortgage. It was decreed, that she took as executrix, and not as legatee, and the residue should go towards the clearing of the real estate; but if the residue had been given to any but the executrix, it had been otherwise. *Hil. Vac. 1693. Barton al's Stone v. —, vide 2 Vern. 308. 2 Ch. Rep. 77.* If a man make *A.* and *B.* his executors, but wills that *A.* shall not meddle till he hath paid *B.* all money due to the testator; in such case *A.* is not executor, nor can by virtue of the will administer until he hath paid *B.* all the money. *Stapleton and Truelock, Moor 11. pl. 44. 3 Leon. 2 Benl. 37. 3 D. A. 364. p. 5.*

Executor's power limited as to the goods, place and time.

A man may make *A.* executor for his plate and household stuff, *B.* for his sheep and cattle, *C.* for his leases and estates by extent, and *D.* for his debts due to him, and so divide the power and administration of his executors at pleasure. *Hil. 17 Jac. Austree and Audely.* Yet quoad creditors they are all executors, and as one executor, and may be sued as one executor. *19 H. 8. 8. Dyer fo. 3. 32 H. 8. Br. Exec. 155. Cro. Car. 293.* He may divide them also, or their power locally, viz. *A.* for his goods in *Buckinghamshire*, *B.* for his goods in *Oxfordshire*, and *C.* for his goods in *Berkshire*. He may also divide them in time, viz. His wife or any other person to be executor during life, or during the minority of the son, or so long as she continues a widow, and after his son to be executor *ut supra*; and so of like limitations or divisions, either for time, place or things wherewith they shall intermeddle; nay one may be made executor for one particular thing only, as touching a statute or a bond, and no more. If a man makes his wife full and whole executrix of all his cattle, corn, and moveable goods, this enumeration of particulars is no exclusion of any other, especially when no other executor was made for the residue; and *Catalla* in *Latin* extends to all things. *Rose and Bartlet, Cro. Car. 292. by Jones*

Jones and Groke contra Barkley; per quod Adjornatur. 3 D. A. 364. p. 6.

Executor being a Legatee.

IF a legacy is bequeathed to the executor, be it a lease, plate, cattle, &c. they shall not vest or settle in him as legatee, but as executor; until express or implied election, 10 Rep. 47, 65. for the law prefers debts before legacies.

If the Executor be a debtor to the Testator.

IF the testator make *A.* and *B.* his executors, and the testator owed *A.* 20*l.* and *B.* was indebted to the testator in 20*l.* the debt from *B.* is extinct in law, the making him executor being a release in law; yet if there be a deficiency of assets to satisfy either the debts or legacies of the testator, a court of chancery will not suffer *B.* to take this advantage; the testator being perhaps ignorant of this point of law, that the debt would be released by making the debtor executor. If there be several joint debtors, and the debtee makes one of them executors, the debt is extinct in law: If there be several executors, and one of them is debtor to the testator, the debt is extinct in law, for the others cannot sue without making him who is the debtor also a plaintiff, which he cannot be against himself. 8 Ed. 4. 3. a. 20 Ed. 4. 17. a. 21 Ed. 4. 3. b. *Woodward and Darcy, Plowd.* 185. *Salk.* 304. Suggestion that the plaintiff *Flud* was indebted to *J. S.* in 30*l.* *J. S.* in his life-time by deed gave all his goods and chattels to *A.* and afterwards made the plaintiff and *B.* his executors, and devised that the plaintiff

Y

should

should pay, out of the 30 l. which he owed him, 10 l. to *Rumcey* the defendant for a legacy; that the defendant sued the plaintiff in the spiritual court for the legacy, when by law the debt was extinct by making the plaintiff executor, and the plaintiff shews that he had proved the testament. *Per Cur'*: The defendant shall have a consultation, for although the joint executor had no remedy to recover this debt against the plaintiff his co-executor, nor could have any action for the same in the life of the plaintiff, yet the debt is not extinct, but shall remain as assets to any other creditors, as 8 E. 4. 3. And by the same reason that such debt shall satisfy a debt, it shall also satisfy a legacy, and more especially as the express intent of the testator was so, having precisely limited the legacy to be paid out of the debt. *Flud* and *Rumcey*, *Yel.* 160. Such a debt shall be assets. *Trin.* 7 J. *Holyday* and *Boas*, 3 D. A. 377. p. 13.

A debtor made one of the executors, he shall account to his companion for debt

See *Brown* and *Selvin*.

Martin had two sons, the elder son was indebted to him in several great sums of money; the elder son sold a rectory for 200 l. and was appointed by the father to pay 100 l. of it to the younger son; the father made his two sons executors and died; the elder paid the 100 l. to the younger, and took a general release; the younger brother exhibited a bill against the elder for an account of the estate, and what he was indebted; the elder brother insisted, that the making him an executor was a release in law, and one executor cannot bring an action of account against his companion, and there being no debts, nor devise of the *residuum*, equity will not revive this duty or account that was extinct in law: but it was held, that though no account lies at law betwixt executors, yet it does in equity; equal benefit was intended them by the will, for otherwise the devisee would have forgiven the debt in express words; and the release in this case, though general, is no impediment here, because given upon another

another occasion. 24 Nov. 1683. *Martin and Martin.*

If the Executor be a creditor of the Testator.

IF the testator make his creditor executor, so that he is the party who should both pay and be paid; he may pay himself before any other in equal degree. If there come not to the hands of such executor sufficient to pay himself, some have held, that he may have an action against the other executor or the heir, if the debt be on a bond; *sed quere* if he administer at all, and especially if he pays himself any part, he is not thereby barred. But if he refuses to administer at all, he may sue the other executors; for otherwise a debtor might craftily make his creditor executor with others, and contrive a means that the goods should only come to the hands of the others, so as the creditor could not pay himself. *Plowd.* 185, 544. 13 H. 8. 15. 11 H. 4. 83. 12 H. 4. 21. 20 E. 4. 17. 21 E. 4. 3. 12 H. 4. 21. 31 E. 3. *Fitz. Ex.* 82.

A lawful executor may retain the goods of the testator in satisfaction of a debt due to him from the testator. 3 D. A. 385. pl. 1.

An executor of his own wrong cannot retain to satisfy himself, because he comes to it by his own act and wrong, and not by any course of law; and if he might retain, there would thereby ensue great inconvenience and confusion. *Ireland and Coulter*, 5 Co. 30. *Cro. Eliz.* 600, 630. *Moor* 527. pl. 696. *Alexander v. Lane*, *Yel.* 137. 1 *Brownl.* 103. 1 *Sand.* 102. 1 *Mod.* 208. 2 *Mod.* 51. *sed vide* 1 *Sid.* 76. 1 *Keb.* 285. 1 *Lev.* 154. and *Styl.* 337, 384. 3 D. A. 386. p. 12.

If the testator was indebted to one executor, he may retain to satisfy himself against his companion.

37 H. 6. 30. *contra* 20 H. 7. 5. *Kel.* 63. a. An executor

executor might retain a debt due to himself from the testator upon a contract; for though no action of debt lay against an executor upon a contract, yet it was a duty, and if he pleaded thereto, and took no advantage of it, it should bind him; and also an action upon the case lies upon such contract against an executor. *Trin. 1649. ro. 948. Sleddal and Bowerbank; vide Vent. 199. Fisher and Snelling. Cro. Jac. 47. Yel. 55.*

Burnet brought an action *Sur Assumpsit* against Greenball, and had a verdict; after the day of *Nisi Prius*, and before the day in bank, Greenball dies; but judgment was entered pursuant to the stat. 17 *Car. 2. c. 8.* Burnet brought a *Scire facias* on this judgment against the executor of Greenball, who pleads a bond of 40 *l.* to himself, and which he retains, and that he has not assets *ultra*. It was held, that the defendant could not retain against the judgment, being of a superior nature. *Burnet against Holden, Lev. 277. Raym. 210. Mod. 6. 2 Keb. 549, 559, 592, 783, 800.*

If an executor *de son tort* wastes the goods of the testator, so that an action lies against him, by the stat. 30 *Car. 2. c. 7.* if the first executor was indebted by simple contract to the second, he may retain for his debt against the debt grounded upon the *Devastavit*, for that shall not be accounted a debt superior to a simple contract. *Bathurst's case, 2 Vent. 20, 40. Sand. 218.*

What acts an executor may do before Probate.

HE may seise and take into his hands any of the goods of the testator; he may enter into the house of the heir if not locked, and take the specialties of debts; and generally he may do every thing that the office of an executor requires, except

except bringing actions and prosecuting suits. 9 E. 4. 33, 47. 7 H. 4. 18. He may pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases or acquittances of debts owing by the testator. If before the probate the day for payment incur upon a bond made by or to the testator, payment must be made to or by this executor, though no will be proved, on like pain of forfeiture as if the will had been proved. An executor may before probate sell or give away any of the testator's goods or chattels. An executor may assent to a legacy before probate, and it will stand good. If the executor die after any of these acts are done, and before he has proved the will, yet the act so done shall stand firm and good; and yet if the executor die before he has proved the will, his executor cannot prove the will of the first testator, and so become executor to him; but if an executor be residuary legatee, and die before probate, his executor may have administration to the first testator, with the will annexed. 22, 23 Eliz. *Istead v. Stanley*, *Dyer* 372. For goods of the testator taken from the executor, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, the executor may, before he has proved the will, maintain an action of trespass, replevin, or detinue; for these actions arise upon his own possession. *Greysbrook and Fox, Plowd.* 281. But before probate an executor cannot maintain an action of debt or the like; for he must therein shew the will proved under the seal of the ordinary; and so he must, if he brings an action for a trespass done, or goods taken away, in the testator's life-time, so as the testator himself was intitled to the action; and it grows not upon the executor's possession. An executor granting the next avoidance of a church, which came to him from the testator, the grantee maintained a *quare impedit* without shewing forth the will. *Dyer* 133. a.

But the executor might have done so, as of his own possession before the will proved, without shewing the will under the seal of the ordinary, as well as in actions of trespass or replevin for goods taken after the death of the testator. In the case of *Greysbrook and Fox, Ploud. 275.* which was an action of detinue by the executor for goods taken and detained after the testator's death, the plaintiff shewed forth the will proved, but that does not shew it was necessary; upon the executor's own contract for the testator's goods, as if the executor sells cattle or other goods of the testator before the will proved, he may maintain an action for the money before he has proved the will; and in this and the action of trespass, there is no necessity of naming him executor: Also the executor may be sued for debts of the testator before probate, for he shall not, by his own act of delaying the probate, keep off suits, except he in due manner renounce, that so administration being granted, there may be somebody suable by the testator's creditors for debts owing by him; and the usual plea of an executor renouncing the executorship is to say, that he is neither executor, nor hath administered as executor; for if he is executor either *de jure* or *de facto*, it is sufficient.

If an obligee releases to the executor of the obligor before probate of the will, it is a good release if he proves the will after. 3 D. A. 369. p. 1.

If an executor before probate of the will brings an action of debt upon an obligation due to him as executor, but when he declares he shews it in court proved, it being proved after the action brought, yet the action is well brought, because he was executor before probate, though by law he is not permitted to sue before probate; yet this being proved, the impediment is removed *ab initio*; for by shewing the will to the court he hath satisfied the ceremony which the law requires. 3 D.

A. 369.

A. 369. p. 2. Vide Comb. 371. 5 Co. a. 1 D.
 A. 648. p. 1. Skinn. 23, 87. 3 Lev. 38. Vent.
 370. Raym. 481.
 An executor before probate may release an action, because the right of the action is in him, and yet before probate he can have no action, Co. Lit. 292. b. Plowd. 273. b. 281. a. 5 Co. 28. a. 9 Co. 39. 10 Co. 52. a. Hutt. 31. 2 Mod. 108. Et vide Dyer 367. pl. 39. 2 And. 191. Wolf and Hayton, Hutt. 30. Palm. 53. Cro. Jac. 614. Salt. 302, 303, 306.

Refusal of the Executorship.

THE ordinary before he commits administration, where a will is made, and executors named, if he know of it, must send out process against the executors to come and prove the will, and if they do not come they are to be excommunicated; but if they come and renounce the executorship, and refuse to prove the will, the ordinary may commit administration. 3 H. 7. 14. 9 Ed. 4. 47. Plowd. 281. Perhaps also they may be appointed executors at a future time, and not presently. Refusal cannot be verbally or by word, but it must be by some act recorded in the spiritual court, and therefore must be done before an ecclesiastical judge. 9 Ed. 4. 13. Plowd. 184. a. Yet Sir Ralph Rowlet having made Bacon lord keeper, Catlin chief justice, and the master of the rolls executors, they wrote a letter to the ordinary that they could not attend the executorship, and therefore wished him to grant administration, which he did, and it was held good: And Catlin after his refusal entering and assigning a lease bequeathed to him by that will, and the administrator assigning it to another, judgment was given for the assignee of the administrator against

How and in what manner the executorship may be renounced.

Catlin's assignee; whereas if the refusal had been void, *Catlin* had continued executor, and his title had been the better; and it was there said, that a refusal might be by parol, and as well by a matter of fact as a judicial act. *Broker and Carter*, 3 *D. A.* 411. p. 1. *Cro. Eliz.* 92. *Moor* 272. *Owen* 44. *Leon.* 135. *Et vide* 2 *Brownlowe* 58. *Quere* if *Catlin* had assigned before refusal, whether he could afterwards have renounced the executorship. If the ordinary himself be made executor, he may refuse before his commissary. 9 *Ed.* 4. 33.

If *A.* makes *B.* his executor who proves the will, and *B.* makes *C.* his executor and dies, *C.* may accept the executorship to *B.* and refuse the executorship to *A.* *Hayton and Wolfe*, *Cro. Jac.* 614. may take the possession of the goods of *B.* and waive the possession of the goods of *A.* *Palmer* 156. *S. C.*

What will determine the election of one named executor to refuse or accept the executorship.

When an executor hath administered he cannot afterwards refuse, because he hath already accepted of the executorship, and so determined his election, at least the ordinary ought not to accept of his refusal, but should compel him to take upon him the executorship. 9 *Ed.* 4. 47. Selling land as executor is administering. *Plowd.* 280. b. If the ordinary admits one to refuse after he had administered, this seems good according to 36 *H.* 6. 7, 8. for there the executor commanded one to take goods of the testator's out of the hands of *J. S.* which he accordingly did, and afterwards the executor refused before the ordinary, and administration was granted to the said *J. S.* who brought an action against the party that took the goods from him, and there the refusal and committing administration was admitted to be good; so perhaps *Factum valet quod fieri non debuit*; and it may be, that the ordinary did not know of the executor's having intermeddled when he admitted of his refusal.

refusal. After refusal and administration committed, the executor cannot go back to prove the will and assume the executorship; but if administration was committed only upon the executor's making default to come in upon process to prove the will, the executor may at any time afterwards come and prove the will, and so undo the administration. *Bale and Baxter*, *1 Leon. 90. Godol. 64, 249.* If after the refusal it should appear to the ordinary, that the executor had administered before, it seems that the ordinary may revoke this administration, and compel the executor to proceed and prove the will, for the executor by administering has determined his election, and accepted the office of executorship, and he cannot both accept and refuse; besides, any creditor of the testator may maintain an action against him, having once administered; and the common plea to free himself, and to shew that he is not a party suable for the testator's debts, being that he neither is executor, nor did ever administer as executor, wherefore he having administered, it shall be found against him. It would be very inconvenient, that in the spiritual court there should be no executor, and that nevertheless there should be an executor in the courts at *Westminster*. As the point of administering is so material, as to being admitted or not admitted to refuse, it will be proper to consider what shall be said an administering by an executor, so as to determine his election, and what not. *36 H. 6. 7.* Some will perhaps conceive, that the act of the executor in the before-mentioned case, where he only commanded one to take the goods of the testator out of the hands of *J. S.* was no administration; it is true in that book it passed *sub silentio*, and is not expressly said to be an administration; but lord *Dyer* speaking of that case in the case of *Greysbrook and Fox*, says expressly, that the ordinary might have rejected the executor's

executor's refusal; for, says he, when the executor had once intermeddled, he should not have been suffered to refuse; so he clearly admits that to have been an administration: And in other books it is said, that if an executor takes goods of the testator and converts them to his own use, this is an administration. 20 *Ed.* 4. 17. and 21 *Ed.* 4. 5. If he sues for the debt of the testator, it is an administration. 8 *H.* 6. 36. If the wife take more apparel of her own than is necessary, this is an administration, but if by assent or delivery of the executors, it is not. 21 *Ed.* 4. 5. 21 *H.* 6. 19, 20. 33 *H.* 6. 31, 8. If one either pays debts of the testator, or receives debts, or makes acquittances for them, or demands the testator's debts as executor, or gives away goods which were the testator's, or delivers money of the testator's for fees about proving the will; all these are full and clear administrations as executor. *Dyer* 166. 13 *E.* 3. *Exec.* 91. *Dyer* 135. 26 *H.* 8. 7, 8. *Kelw.* 63. 8 *H.* 6. 36. 11 *H.* 4. 84. 2 *Brownl.* 58. But if he only lay out his own money for fees, this is no administration; so if he pays debts with his own money, and if he do it about funerals. 21 *Ed.* 4. 5. 20 *H.* 7. 5. *a.* But some difference may be between acts done by one named executor, and a stranger, viz. to make him an executor of his own wrong, whereof we shall speak hereafter. If one being sued as executor, take upon him and plead in bar as executor, this is an administration. 9 *E.* 4. 12, 13. 33 *H.* 6. 31. *a.* *Vide Salk.* 308. If goods are devised to an executor, and he takes them without the assent of the other co-executor, it is an administration, for a devisee cannot take goods devised without the assent of the executor. 11 *H.* 4. 84. If the executor seises the goods of the testator, it is an administration. 8 *H.* 6. *Stokes and Porter.* *And.* 11. *Moore* 14. pl. 35. *N. Bend.* 74. pl. 115. *Dyer* 166. p. 10. If

If a man makes two executors and dies, and one before probate of the will releases an action to the debtor of the testator, this is a consent to the executorship, so that he cannot afterwards refuse to administer. *Wilkinson and Thomas, 3 D. A. 370.*

p. 15. If one makes two executors and dies, and one proves the will in the name of both, against the will of the other, this is not administration to him who did not consent to the probate, but he may plead *Ne unicus executor, &c.* for the probate doth not make him executor if he did not administer. *26 H. 8. 8. 6.* If there be two executors, and one of them only proves the will, and the other by his delivery, and as his servant, takes and sells the goods, this is no administration by him who acted as servant. *Godfrey and Woodward, Cro. Eliz. 858.*

If an executor take the oath, though after a caveat entered, he cannot after refuse. *1 Vent. 335.* So if he once administer, he cannot after renounce, and administration granted after is void. *1 Mod. 214. 2 And. 150, 151.*

If there be but one executor, and he doth refuse, or if there be many executors, and all of them refuse, then is the party dead intestate, and administration is to be granted with the will annexed, and none afterwards can meddle as executors. The effect of a refusal.

But if there be several executors, viz. *A. B.* and *C.* and *A.* only refuses, and the will is proved by the others, then *A.* continueth executor notwithstanding his refusal, so as he may still release debts of the testator, and debts owing by the testator may be released to him. *5 Co. 28. 18 E. 2. Bro. 837.* If a suit be commenced by or against the executors, it must not be only in the name of *B.* and *C.* but *A.* must be added as plaintiff or defendant. *22 Ed. 3. c. 19. 41 E. 3. 22. 21 E. 4. 24.* For the will being proved, all the executors Where several executors and some only refuse.

executors therein named stand and continue executors notwithstanding any of their refusal; and therefore an executor which hath refused, may afterwards administer at his pleasure. 9 Co. 36, 37, and intermeddle with the goods at his pleasure: There may be some difference betwixt suits by executors and suits against executors; for when the executors sue, they being privy to the will, and having the custody of it, must bring their action in the name of all the executors according to the will; but when an action is brought against executors, the party need not perhaps take notice of more executors than those who have proved the will or do administer, for it is no good plea for them to say that there is another executor, without saying also he hath administered. 33 H. 6. 38. a. 9 Co. 37. b. 32 H. 6. 25. 27 H. 8. 11. 9 E. 4. 33.

If there be two executors, and one proves the will and dies, the other executor, though he never acted or concurred in proving the will, continues executor till he makes an actual renunciation, so as to intitle the ordinary to grant administration of the remaining personal estate. *House and Lord Petre, Salk. 311.* For he might have come in when he pleased, and could not renounce during the life of him that proved. *Salk. 33 Far. 39. Dyer 160. pl. 42. 9 Co. 37. a.*

If there be several executors, and one renounces before the ordinary, and the others prove the will, yet by the common law he that renounced may at any time come in and administer; and though he never acts during the life of his companions, yet after their death he may take upon him the execution of the will. *House and Lord Petre, Salk. 311.*

If there be two executors, and one proves the will, the right is in both, and the other cannot refuse till after the death of him that proved it, and then

then he may. *Brook and Stroud, Far. 39. Salk. 3. 307. 311.* And though he does refuse, he may afterwards administer at his pleasure. *9 Co. 37. a. And. 127. Kely. 207. b. N. Bendl. 15. pl. 18. 2 Brownl. 58.* But if all the executors refuse, and thereupon administration is granted, they cannot afterwards administer or act as executors. *Cro. Eliz. 292. Moor. 272. pl. 426. Leon. 135. 2 Brownl. 58.*

Of the Probate of Wills.

THE proving wills is in the spiritual court; yet in some manors by prescription wills are to be proved before the steward, though no lands are thereby devised. *2 R. 3. Fitzb. 4. 9 Co. 43.* The proving wills in the spiritual court is not of ancient but of late date. *11 H. 7. 12. Plowd. 279.* The proving before the ordinary general, particular or special; by general is meant the metropolitan or archbishop, before whom it is to be proved if the testator have goods valuable, called *bona notabilia*, in divers dioceses, where he is the superior.

Where and before whom the will must be proved.

There have been diversity of opinions about what shall be said *bona notabilia*; some holding that they must be of 40 s. value; some 5 l. some 10 l. and some have held, that the value of a penny is sufficient to draw it to the archbishop from the particular bishop; but that matter seems to be settled by the 93d Canon, made 1 Jac. 1. whereby it is ordained, that 5 l. shall be the sum or value of *bona notabilia*; and that none shall be said to have *bona notabilia* unless he hath goods in several dioceses to the value of 5 l. There is in the said canon this proviso, that where by composition or custom in any dioceses, *bona notabilia* are rated at any greater sum, the same shall continue not altered;

Bona notabilia, of what value to be.

[in

[In the diocese of London it is not by composition. 4 Inst. 335.] and that if any man die *in itinere*, viz. in his journey or travel, the goods which he then hath about him, shall not cause that administration shall be committed, or the will proved before the metropolitan. Vide 3 D. A. 353. J. p. 1. 354. p. 2, 3, 4, 5, 6.

What shall be
bona notabilia.

Debts owing to the testator are *bona notabilia* as well as goods in possession, if they are of value sufficient; but an obligation in the penal sum of 5 l. conditioned for the payment of a less sum, shall not be taken to be *bona notabilia*, though the bond be forfeited; but a debt of 5 l. or more, tho' it be desperate, or due from the king, against whom no suit can be but by petition, yet this shall stand as *bona notabilia*. If a man hath goods of the value of 5 l. in one diocese, and a lease for years of the same value in another diocese, these are *bona notabilia*, by which the archbishop shall grant administration, though the lease for years is not a thing moveable, nor properly *bonum*, but it is a chattel, as the pleading is 3 D. A. 353. H. p. 1, 2, 3. Lib. Intr. 324. 2 Leon. 155. Lutw. 30. 2 Lutw. 994.

Whether the
debts shall be
bona notabilia in
the diocese the
debtor or creditor
is in, or where
the bond or
specialty is.

As the person of the debtor is moveable and transitory, debts shall be said to make *bona notabilia* where the bonds and other specialties be, and not where the debtor inhabits or dwells. If a man hath goods of the value of 5 l. in one diocese, and an obligation of greater value in another diocese, the obligation being made there also, these are *bona notabilia*, for which the archbishop shall grant administration. 3 D. A. 353. H. p. 3. If a man dies intestate having several debts upon obligation in several dioceses, the debts shall be said *bona notabilia* where the obligations are, and not where the debtor or debtee is. Trowbridge and Taylor, 3 D. A. 353. H. p. 6. Luke a merchant of Ireland was obliged in 80 l. to one D. in London;

London; the obligation was made in Ireland, but all times remained in London; D. died intestate in the county of Bedford in England. The bishop in Ireland committed the administration to the son of D. and he released; the archbishop of Canterbury committed the administration in England to the wife of D. who had the obligation, and she recovered upon it; for the administration shall be committed in the place by the ordinary where the obligation was at the death of the intestate, and not where the debt began, for it is not local. *Dyer* 305. *Byron and Byron, Cro. Eliz.* 472. *Noy* 54. Of debts without specialty, being bona notabilia, vide 3 *D. A.* 353. *H.* 4. *Dyer* 305. *a. Margine.* 3 *Keb.* 163. *Comb.* 392. *Carth.* 374. *Cro. Eliz.* 472.

If one hath a judgment in any of the courts at *Westminster*, this makes bona notabilia, though the action upon which it was obtained was laid in another county. *Gold and Strode, Carth.* 148. 3 *Mod.* 324. *Par.* 15. *Salk.* 40. *Lutw.* 401. 6 *Mod.* 136. *Mod. Caf.* 244. 2 *Show.* 437.

If a man dies in a diocese not having any goods there, but hath bona notabilia, in any other diocese, it will be sufficient bona notabilia for the archbishop to grant administration, &c. 3 *D. A.* 353. *H.* 4. 7. A man dies in one diocese, and bona notabilia in another, the archbishop shall grant administration.

If one hath not bona notabilia in divers dioceses, so as of right the proving the will appertains not to the metropolitan, and yet the will is proved before him, this is not merely void, but stands in force till it be reversed by some sentence upon appeal. *Kere and Jefferys, Moor* 145. 5 *Co.* 30. a. Where bona notabilia not in divers dioceses, probate by the archbishop is not void, but voidable only.

But if one hath bona notabilia in diverse dioceses, or in a peculiar and a diocese, and the will is proved before the particular bishop within whose diocese part of the goods are, this is utterly void without any reversal; so if proved before the peculiar. *Moor* 145. 5 *Co.* 30. a. Probate before the particular bishop, where bona notabilia in divers dioceses, is absolutely void.

If

Where the will is to be proved where there are bona notabilia both in the province of Canterbury and York; and where if in one diocese in the one province, and in several dioceses in the other.

If one have bona notabilia both in the province of Canterbury and also in the province of York, the will must be proved either before both metropolitans, if within each of their jurisdictions there be bona notabilia in divers dioceses; or else if there be bona notabilia only in one diocese in each province, then the will must be proved before the particular bishops in those several provinces in whose dioceses the goods are. If the testator hath bona notabilia in divers dioceses in one province, and hath goods but in one diocese in the other province; then in the first case the will is to be proved before the metropolitan, and in the other before the particular bishop; the like law is in the case of peculiar jurisdictions. If a man hath bona notabilia in Ireland and in England, and dies intestate, there shall be several administrations granted, viz. By the archbishop of Dublin for all within his province, and by archbishop of Canterbury for all within his province. [Per Hale, so if in the provinces of Canterbury and York, 2 Lev. 86. and administration granted in one province, is void as to the other, because they are distinct supreme jurisdictions. Hard. 216. Salk. 39.] But it seems to be intended, that he had bona notabilia in divers dioceses within each province, or goods in each diocese, for otherwise it seems it ought to be granted by the ordinary where the goods are, and not by the metropolitan. 3 D. A. 352. G. p. 1. Dal. 76, 77. 3 Keb. 163. Dyer 303.

The Force and Strength of the Probate.

Defendant may deny that the plaintiff is executor, the seal of the ordinary no estoppel.

THE will being proved under the seal of the ordinary, some have held, that it cannot be denied whether it be a will proved or not, though the proof be but indorsed on the back, viz. that it is so proved. 9 Ed. 4. 47. 22 Ed. 4. 50. 22

H. 6. 52. But notwithstanding this, the defendant may deny that the plaintiff is executor, as not being concluded nor estopped by the probate; for the seal of the ordinary is but matter of fact, and not matter of record; nor are the sentences of divorce, and the like, in the spiritual court, judgments or matters of record, as hath been often held. *Plowd.* 282. 7 *H. 6.* 13. *Parry v. Parry.* 44 *Ed.* 3. 32. 19 *Aff.* p. 2. 2 *Roll. Abr.* 576. p. 2. *Roll. Rep.* 395. 3 *Bulst.* 250. *Yel.* 115. *Brownl.* 97. 2 *Mod.* 168. 2 *Vent.* 179. *Lutw.* 891. 3 *D. A.* 414. p. 1.

The probate of a will cannot be controverted at common law. *Sir Richard Raine's case, Lord Raym.* 262. 12 *Mod.* 136.

Though neither the courts of law, nor the court of equity can determine the validity of a probate adversarily; yet if it comes incidentally, and the incident is admitted by the parties, those courts may determine it, and hold the parties bound by their admissions. *Sheffield v. The Duchess of Buckinham, Atk. Rep.* 630. 2 *Eq. Cas. Abr.* 527.

It is a question whether the probate or register of a will be evidence to prove a pedigree. *Dike v. Polhil, Lord Raym.* 744, 745.

According to *Holt* chief justice, the register's book is good evidence to prove a will concerning lands. *St. Leger v. Adams, Lord Raym.* 731.

The devise of a personal estate is not looked upon to be of any effect until probate is made of the will by the executor; neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate; for this will is no will until it has received a sanction, or an allowance of it in the spiritual court, for they are to judge whether it be a will or not, and the temporal courts are not to look upon it as a will till probate be made; and in trover for goods, which a testator gave to

his sister in his life-time, brought against his executor for them, who would have given in evidence a former will, to have shewn that he had no power to give these goods; this was refused, because he ought to have produced the probate; *per Ward chief baron, Chaunter v. Chaunter, 11 Vin. Abr. 205. pl. 20.*

Though an administration is not taken out, till after the filing of the bill, yet if procured before a cause comes to a hearing, in equity it is sufficient, otherwise at law, because there the defendant may craveoyer of the letter of administration.

It is charged by the bill, that the plaintiff is the representative of the late Mr. Tull, and has taken out administration, and by that means intitled to a demand against the defendant; neither the title he sets up objected to, nor the administration denied by the defendant's answer; and therefore though the administration was not actually taken out till some time after the filing of the bill, yet, as the plaintiff has procured it, before the cause comes to a hearing, in equity it is very sufficient, though not good at law, because there the defendant may craveoyer of the letters of administration; but nothing is more frequent in this court than where a plaintiff has a right to a distributory share, and the administrator is not made a party to the suit, to order him to be brought before the master, and the bill is never dismissed in such a case for want of his being a party. *Tull v. Lutwidge, 2 Atk. Rep. 120. pl. 110.*

Spiritual court obliged to deliver out will of land on security.

Before the year 1718. the method was to deliver out a will of land to be proved at trials or on commissions, upon security. Since that, the registers have refused to deliver out the will, but insist upon being paid for attending with it; and where it was wanted at a distance, their demands run very high. In this case an order was made (upon producing three precedents) that it should be delivered out on security: it being a bill brought by creditors and legatees, who were not likely to suppress it. *2 Str. 961.*

Probate of a will of goods and chattels, how far evidence.

The seal of the ecclesiastical court (as to goods and chattels) doth authenticate the will, and is not

not to be contradicted; because, as there is no way in the temporal courts to prove the will relating to chattels, it must go on in the spiritual court, and the determination must there be final. For the temporal court cannot make a judgment concerning the will, contrary to what was made in the ecclesiastical court; and therefore, if a probate is shewn under the seal of the ordinary, they cannot give in evidence that the will was forged, or that another person was executor; but they may give in evidence, that the seal was forged, or that there were *notabilia*, because it is not in contradiction to the real seal of the court, but it admits the seal, and avoids it. And since the ecclesiastical court hath now the probate of wills settled by custom, the temporal court cannot prohibit them in their inquiries whether the testator was *compos mentis* or not, or whether the will be revoked or not, because that is necessary for authenticating the will. *Str.* 671, 672.

Where the probate is lost, an exemplification of it, from the act of the spiritual court, hath been allowed as evidence of the will being proved. *Stra.* 412.

To what Time the Probate or Refusal shall relate.

BOTH the proving and refusal have relation to the death of the testator; As to the proving lord *Dyer* is expressly of this opinion in the case of *Greysbrook* and *Fox*, *Plowd.* 281. a. 283. and the resolution also of that case proves the same. There administration being granted before the will proved, or notified to the ordinary, the administrator sold some of the goods to *J. S.* and afterwards the executors proving the will, brought

Probate or refusal shall have relation to the death of the testator.

detinue for the goods against J. S. who pleaded this administration and sale, and thereupon the executors demurred, and judgment was given for them, as having, by proving the will, disproved the administration *ab initio*: And the refusal shall have the like relation, else could not the administration relate to the death of the intestate, as it doth to some purposes, viz. to have an action of trespass for goods taken before administration committed, and to have a rent growing payable in the mean time. 18 H. 6. 22. 9 Ed. 4. 33. 47. 5 Co. 28. 36 H. 6. Dyer 110.

C H A P. VII.

*What Things shall come to the Executors ;
What go to the Heir ; Of Paraphernalia ;
What shall be Assets ; The Power of an Executor ; Where, upon the Death of one Executor, the Surplus shall survive ; When the Executor shall have the Surplus of the personal Estate ;
What debts ought to be first paid.*

What Things shall come to the Executors, and be Assets in their Hands.

THE executor shall have all leases for years, Chattels real, lands extended on any judgment, statute or recognizance, all arrearages of rent due at the death of the testator.

The interest in the liberty of a prisoner in execution for debt is a chattel personal, and shall go Chattels personal, to the executors. The interest which one hath in an apprentice is a chattel personal, and shall go to the executors : The executors shall also have all the testator's cattle, as bulls, cows, oxen, kine, sheep, horses, swine, and all poultry, household stuff, money, plate, jewels, corn, hay, wood severed from the ground, wares, merchandizes, and such like movables. If the testator have any tame pigeons, or deer, rabbits, pheasants, or partridges, they shall go to the executors ; and though they were not tame, if they were kept alive in any room, cage, or such like place ; so fish in a trunk ; also young pigeons, though not
Z 3 tame,

tame, being in the dovehouse, and not able to flie out; but the old ones shall go with the dovehouse to the heir. Hounds, greyhounds and spaniels, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors. If a man seised for life, or in fee or tail in his own right, or in the right of his wife, or for years in the right of his wife, and sows the ground with corn, but dies before it is ripe, his executors shall have it, and not the wife or heir; but grafs ready to be cut for hay, apples, pears, and other fruit on the trees, shall go to the wife, and if they be upon his own inheritance, shall go the heir: The reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. Hops, though not sown, if planted, and saffron and hemp, because sown, shall go to the executors. If the wife had the lease for years as executrix, and the husband sows the ground with corn, and dies before it is ripe, the corn shall go to his executors, at least so much as is more than the yearly rent of the land: But if the husband and wife were joint-tenants of the land, she shall have the corn, and not his executors. Questions have sometimes been put touching coppers, leads, furnaces, fats for dyers or brewers, pales, rails, glafs in windows, tables dormant, wainscot doors, locks, keys, and such like, whether they should go to the heir or executors. 21 H. 7. 26. An executor taking away a furnace which was set in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged for the heir, that this should go as part of the freehold and inheritance of the heir. In the case of *Day and Austin, Walmesly* said that lord *Dyer's* opinion was, that where the furnace is not fixed to the wall, the lessee might, within his term, take it away, but not if it was fixed to the wall, for there it would strengthen the house.

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Geo. Eliz. 347. *Owen* 70. *Vide* 3 *D. A.* 315. *Y. p.* 1, 2, 3, 4. Glass in the windows, wainscot, posts fixed, millstones, doors and keys, go to the heir: Pictures and glasses, though generally speaking, no part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put, shall go to the heir; for the house ought not to come to the heir maimed or disfigured. 2 *Vern.* 508. 4 *Co.* 64. a. * If a chest with deeds be shut, the heir shall have the chest also; but if it be not shut, the executor shall have the chest. 41 *Ed.* 1. 2. 14 *H.* 4. 30. 36 *H.* 6. 26. 18 *Ed.* 3. 4. 3 *H.* 7. 15. But this distinction seems not to be well taken; for if it be a box purposed for the keeping of the deeds, the heir ought to have it whether locked or open: On the other hand, if it be a box designed for other use, as for the keeping linen, &c. in, it cannot be said to be appurtenant to evidences, altho' some be in it, for so may other things also; or perhaps it may be a valuable chest curiously inlaid, or an *India* cabinet of great value; surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts, as too often, to the creditors of gaudy courtiers.

* But in the case of *Harvey and Harvey*, M. 14 *Geo.* 2. in trover by the executor against the heir, it was held by Lee, chief justice, that hangings, tapestry, and iron backs to chimnies, belonged to the executor; who recovered accordingly against the heir. *Harvey and Harvey*, *Stra.* 1141.

And the law seemeth now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them; as tables although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise. 2 *Burn's Eccles. Law* 643.

What Things shall go to the Heir, and not to the Executor.

The executor shall have a mortgage in fee, tho' two descents cast, and more due than the land worth.

IF there is a mortgage in fee, and two descents cast, and there is more due on it than the value of the land, and though the mortgagor says he will not redeem, yet it shall go to the executor, and not the heir, the equity of redemption not being foreclosed or released. *Tabor and Grover, 2 Vern. 367.*

If a mortgagee in fee in possession absolutely sells the land to J. S. it shall go to the heir of J. S. and not to his executor.

But if a mortgagee in fee enters for a forfeiture, and after seven years enjoyment absolutely sells the land to J. S. and his heirs, this estate shall not be looked upon as a mortgage in the hands of J. S. but shall go to his heir, and not to his executor. *Cotton and Iles, Vern. 271.*

Mortgagee in fee in possession devises the land to his daughter and her heirs, it shall go to her heir, and not to her executor.

A man having several mortgages, one in fee, on which he entered for a forfeiture, devised those lands which were mortgaged in fee, to his two daughters and their heirs, and the mortgages to them, their executors, &c. One of the daughters died, her share of the lands which were mortgaged in fee, shall go to her heir, and not to her executors; for it was the testator's intent that those lands should pass as a real estate, though between him and a mortgagor they were but a mortgage. *Noys and Mordaunt, 2 Vern. 581.*

Though the heir forecloses, the executor shall have the mortgage.

If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money, and then he may have the benefit of the mortgage. *2 Vern. 67.*

A mortgage term attending the inheritance, shall go to the heir.

If a man purchase land in his own name, and takes an assignment of a mortgage term in the name of a trustee, yet the term shall attend the inheritance, and go to the heir. *Tiffin and Tiffin, 1 Vern. 1.* So if a purchaser takes the mortgage term

term in his own name, and the inheritance in the name of a trustee, it shall go to the heir, though not mentioned that it was to attend the inheritance. *North and Langton, 2 Ch. Ca. 156. 2 Cha. Rep. 271.*

If a woman who is *Cestuy que trust* of a term, having the inheritance in her, marries and dies, the term shall attend the inheritance, and not go to the husband as her administrator. *Best and Stamford, 2 Vern. 520. Salk. 154. Vide postea the case of Chapman and Bond.*

So a term attending an inheritance.

Paraphernalia.

ΠΑΡΑ' *præter, et ὅσα ἐν δότῃ, quam uxor affert; a* *The derivation*
φίρω φέρο. παράφεραι bona, quæ sponsa præter *and meaning of*
constitutam dotem secum, affert. Vide Minsing. upon *the word.*
the Institutes 97. The Petit Customs of Normandy,
Ch. de donaire de fems 395. In our law bona para-
phernalia, are the woman's apparel, jewels and
other things which in the life-time of her hus-
band she wore as the ornaments of her person, to
be allowed at the discretion of the court according
to the quality of her and her husband. Vide 18
Ed. 4. 11. and 12 H. 7. 25. Lynwood 126.
Bracton 92.

The wife after the death of her husband shall have her necessary apparel for her body, and not the executors of her husband. *37 H. 6. 28.* If she takes more she shall be taken to be an executrix *de son tort. Roll. Ab. 918. G. p. 2.* The wife shall have convenient apparel, and this shall be determined by the discretion of the justices. *33 H. 6. 31. 37 H. 6. 2. Bro. Administrator 6. Bro. Executor 19. Fitzh. Executor 24.*

The wife after the death of her husband shall have her necessary apparel.

If the husband delivers to the wife a piece of cloth to make a garment, and dies, although it be not made into a garment in the life of the husband, yet the wife shall have it, and not the executor of the

the

the husband, in as much as it was delivered to her for this intent ; but against the debtee of the husband the wife shall have no more apparel than is convenient. *Mich. 40, 41 Eliz. Harwell and Harwell, Roll. Ab. 911.*

Sir *John Davies* by will devised the use of 130 pearls, and of a diamond chain to his wife during her widowhood, she entering into security to his daughter for delivering them to his daughter when she should marry or die: Sir *John's* lady had wore these jewels in his life-time as the ornaments of her person, and was the daughter of a baron of *England* and earl of *Ireland*; and after Sir *John's* death she married Sir *Archibald Douglas*, against whom the administrator of Sir *John Davies* brought an action of trover for these jewels: All the court agreed, that the husband, during the coverture, might dispose, give, sell, or alien at his pleasure, all the wife's jewels, ornaments and apparel. *Richardson* and *Croke* said, that he might by his last will dispose of all but the necessary apparel; but it was said by *Jones* and *Barkley*, that he could not dispose of the convenient apparel and ornaments of the wife; for by the law of convenience and reason they are vested in the wife by the death of the husband, and his will cannot prevent her of them no more than heir-looms, and where the custom is, that the wife or children shall have *rationabilem partem bonorum*, the husband or father cannot by his last will give those goods, yet in his life he may dispose of them. *Richardson* and *Croke* would not have the wife to have any part of the goods of the husband but apparel of necessity, to cover nakedness, and defend her against the cold. *Barkley* and *Jones* would have necessary and also convenient apparel, and this cannot be given from her by the last will of the husband; and this conveniency, and reasonable apparel and ornaments of the wife are to be determined by the discretion of the justices, having consideration of the

estate of the husband and wife, and the debts of the husband; and this is to be moderated more or less according to the said circumstances; and in the case in question these circumstances induced them, that the jewels appertained to the wife. The husband was a knight, and king's serjeant, out of debt, had but one daughter, to whom he had given a great portion; the wife was descended from nobility; the husband had suffered the wife during his life to use them as the ornaments of her person; he even thought them convenient for her during her widowhood; and these circumstances induced *Barkeley* and *Jones* to be of opinion in this case for the defendant; there is no book against their opinion. 33 H. 6. 31. 37 H. 6. 2. 18 E. 4. 11. 1 Eliz. 166. 12 H. 7. 23. Afterwards *Croke* said, that he agreed in the whole with *Barkeley* and *Jones*, saving that the husband in this case had devised them to the wife during her widowhood, otherwise she should have had these things. Hil. 9 Car. *Lord Hastings v. Douglas*, *Jones* 332. Cro. Car. 343. 3 D. A. 358. p. 9.

Four gold chains, twenty-eight dozen of gold buttons, and an agate, were allowed to be the paraphernalia of a viscountess. Mich. 27, 28 Eliz. *The Viscountess of Bindon's Case*, *Moor* 213. pl. 354. And said by *Manwood* chief baron, that jewels of the value of 500 marks were a good allowance for such matters. 2 Leon. 166.

The husband devised the wife's jewels to her for life, the remainder over to his son; one point of the case was, whether they should go to the administrator of the wife, being her paraphernalia? And though it was agreed, that where a husband dies intestate, or does not by will dispose of the jewels of his wife, she may claim them (in case there be no debts); yet as he may devise them, and as he has in this case given them to her for life only, and she has not made any election or claim

Gold chains and buttons allowed as paraphernalia.

The husband devises the wife's paraphernalia to the wife for life, remainder over.

to them as her *paraphernalia*, they cannot go to her administrator. 2 Vern. 246, 247.

Bona paraphernalia shall not be applied in discharge of debts affecting the real estate.

A. died indebted by covenant, his personal estate not being near sufficient for the payment of his debts; a bill was brought against the heir to have the deficiency of the personal supplied out of the real assets: A question arose, whether the widow's *paraphernalia* should be liable in case of the real assets? since *bona paraphernalia* are personal estate; and the rule is this, all the personal ought to be applied in exoneration of the real estate. Lord Chancellor: I take it, that *bona paraphernalia* are not devisable by the husband from the wife any more than heir-looms from the heir; so that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee. Though a mortgagee or bond-creditor may subject a legacy to his debt, yet the legatee shall in equity stand in the place of the mortgagee or bond-creditor, and take as much out of the real assets, as such creditors shall have taken from the legacy; wherefore if a legatee shall have this favour in equity, much more shall the wife be privileged with respect to her *bona paraphernalia*. *Bona paraphernalia* are liable only to debts, and in favour of creditors, and not of an heir. The personal is not applicable in case of the real estate, if thereby the payment of any legacy will be prevented, much less where it will deprive the widow of her *bona paraphernalia*. Mich. 1721. *Tipping v. Tipping*. Same term like decree. *Pucking and Johnson, Wil. Rep. 729. Trin. 1729. Tynt v. Tynt, 2 Wil. Rep. 542.*

Bona paraphernalia not allowed to the widow where there are not assets at the death of her husband, though contingent assets afterwards fall in,

W. P. having by will subjected his lands to the payment of his debts, died indebted to a greater amount than what his real and personal estate would pay; the widow gave up her jewels and plate; but in the decree for the sale of the real estate, &c. the widow's claim of her jewels and plate was saved to her. Afterwards an estate expiring

expiring, whereby a reversion fell in subject by the will to the debts; it was determined *inter alia* by the lord chancellor, that with respect to the claim of the jewels as *bona paraphernalia*, the widow could have no title to them, regard being to be had to the time of the death of the testator, when the real and personal assets were not sufficient for the payment of the debts; nay, at the time when these jewels were applied to the debts, there was a deficiency of assets real and personal for the payment thereof; and though afterwards upon a remote contingency, (such as was not to be presumed or waited for, *viz.* a death without issue), assets had fallen in, yet that this should not alter the case as to the *bona paraphernalia*; for the same might not have happened until twenty or thirty years after the death of the testator, nor (possibly) until after the death of the widow, when the end of the widow's wearing her *bona paraphernalia* in memory of her husband, would not have been answered; and therefore it was reasonable this should be reduced to a certainty, *viz.* that if there should not be assets real or personal at the testator's death, or at least at the time when the jewels were applied to debts, then the jewels should be liable. *Trin. 1722. Burton v. Pierpoint, 2 Wil. Rep. 78. 2 Eq. Cas. Abr. 627. pl. 7.*

What shall be Assets.

A Lease for years made by a copy-holder by the licence of the lord, shall be assets in the hands of the executor of the lessee. *Poph. 188.*

If an executor hath goods of the testator in any part of the world, he shall be charged in respect thereof. *6 Co. 47. Cro. Jac. 55. Hard. 64.*

If an executor recovers damages in trespass *de bonis asportatis in vita testatoris*, this shall be assets; for

for that he recovers it as executor. 3 H. 6. 3. b. *Vide* Yel. 33. Hob. 38. Savil 119. But goods taken after the death of the owner are assets in the hands of the executor before satisfaction recovered. Owen 132. Cro. Eliz. 810. Inst. 124. a. Leon. 225. If an executor recovers as executor things in chancery by equity, these things so recovered shall be assets. Harwood and Wrayman, 3 D. A. 376. p. 5. Moor 858, 1178. Rol. Rep. 56. 1 Brownl. 76, 77. Noy 67. 6 Co. 47. a.

Lands devised for payment of debts, when assets.

If a man devises lands to be sold by J. S. for payment of his debts and lagacies, and makes J. S. his executor and dies, the money made by J. S. upon the sale of the lands, shall be assets in his hand. 3 D. A. 376. p. 6. But it is otherwise if the lands are devised to be sold by the executors and others, for there the money shall not be assets, for they were not trusted therewith as executors. 3 D. A. 376. p. 6, 7. 1 Lev. 224. Hard. 74, 405. If lands are devised to executors for three years for payment of debts, it is assets in the hands of the executors; but if lands are devised to be sold for payment of debts, it is no assets before sold. Brownl. 34. 2 Brownl. 47.

Debtor executor, the debt is assets to debts.

If the debtee makes the debtor and a stranger executors, by which the debt is extinct in the hands of the debtor, yet it shall be assets in his hands to debts, for this is but extinct by the will. 8 Ed. 4. 3. Plowd. 185. Yelv. 160. Salk. 304. 3 D. A. 377. p. 12, 13.

Goods in the hands of an administrator durante minori etate, assets in the hands of the executor when he comes of age.

If a man make A. his executor during the minority of B. and makes B. his executor after his full age, and afterwards B. comes of age, and takes upon him the executorship of the will, the goods of the testator which are in specie in the hands of A. after the executorship of B. are assets in the hands of B. though B. never had the possession of them; for he may have trover and conversion of them against A. Chandler and Thomson, 3 D. A. 377. pl. 15. Hob. 265.

A bond to the testator in the hands of the executor is not assets till recovered, because but a chose in action; but if an executor releases the debt, he hath made it assets in his hands to the value of the whole bond. *Owen 36. Vide Salk. 296. Comb. 342. Salk. 207.*

Bonds not assets till recovered.

If an executor, after he comes of full age, proves the will, and releases all actions to him who was administrator during his minority, and who then had goods in his hands of the testator's, this is assets in the hands of the executor, for the law presumes he hath received as much as he released. *Brightman and Keighley, Cro. Eliz. 43.* But *Periam* said, that if an executor releases an account, and it was uncertain what he should recover, it is not assets; but if it can appear or be proved that so much was due, it is assets. A release is as good a satisfaction in law as a satisfaction in deed; and therefore if an executor releases, the debt released is adjudged assets in his hands. *Hob. 66. Knightley and Knightley, 4 Leon. 102, 103.* The diversity taken where the account was certain or uncertain was denied, unless such as would not be proved to a court or jury. *Godb. 30. And. 138.*

A debt released by an executor is assets.

Upon a traverse of a *Devastavit* the jury gave a special verdict as follows: *Hope* possessed himself of goods of the testator to the value of 600*l.* the executor refuses to prove the will, whereupon administration is granted to *D.* who sues *Hope* for the goods, and has him in prison upon mesne process, and then *Hope* and the administrator come to articles of agreement, viz. That *Hope* shall be discharged of the imprisonment, and pay so much money, and deliver back the goods unfold; and the administrator covenants to save him harmless against all actions that shall be brought by any one against him as executor of his own wrong. The question was, whether this covenant to pay the money should be present assets? *Hale*: If he discharge a debt by covenant or release, it is as much

Compounding a debt, and taking security for it in his own name, makes it assets.

much as a receipt, and is a *Devastavit*; but if only an increase of security be taken, it is not to be said assets; but where money is owing upon promise, or simple contract, and he takes a bond for it, there this is assets, for the former debt is discharged and swallowed up by the bond; but if one bond be taken for discharge of another before condition broken, it is otherwise, and here the covenant cannot be a discharge of the first duty till payment be made. *Cur' Advisar'. Hil. 27, 28 Car. 2.* Judgment given for the plaintiff. *Trin. 29 Car. 2. Norden and Levett, vide 2 Lev. 189. 2 Jones 88. 3 Keb. 597, 615, 691, 706, 742, 778. 3 D. A. 378. p. 21.*

Executor submits a bond of 100*l.* to arbitration; awarded he shall take 70*l.* and release; the whole 100 is assets.

If an executor puts in suit a bond of 100*l.* for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay 70*l.* in full satisfaction, and that the executor shall release, which is done accordingly, the executor shall be taken to have assets to the value of the whole 100*l.* and though by the award he was compelled to release, it was his own act to submit to the arbitrament. *3 Leon. 53.*

Where goods taken away shall be assets.

If a trespasser takes goods in the life-time of the testator, so that they were never more than a chose in action to his executor or administrator, they are not assets till recovered: Otherwise if taken after his death. *Bethel and Bethel, Cro. Eliz. 810. Owen 132. 2 Andersf. 172.*

Money paid to a stranger by the assent of the executor, is assets.

If money due to the testator is paid to a stranger by the consent of the executor, it is assets in his hands immediately; and if without such consent, and he after brings an action for it against the receiver, (by which he agrees to the receipt) and recovers it, it shall be assets immediately without execution, for the original debtor is thereby discharged. *Jenkins and Plume, Salk. 207. 6 Mod. 91, 92, &c. 181.*

What of the rent of a lease for years shall be assets.

If the executor of the lessee for years enters and receives the profits, yet no part thereof will be assets

Testaments, Last Wills, and Executors.

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assets, unless what is over and above the rent; but is received by the executor as tertenant, and appropriated to the use of the lessor. *Buckly and Perk, Salk. 79. 2 D. A. 504. p. 10.*

By the statute of 29 Car. 2. c. 3. par. 12. an estate *pur auter vie*, if there be no special occupant thereof, shall go to the executors or administrators of the party who had the grant, and shall be assets in their hands; yet whether it would be so unless for payment of legacies, unless particularly charged therewith, is doubted in the case of *Oldham and Pickering, Carth. 376. Salk. 464. Comb. 388.*

If *A.* purchases a walk in a chase, and takes the patent to himself and his wife, and *J. S.* during their lives and the life of the survivor, though *A.* dies indebted, and his assets are not sufficient to pay his debts, yet the wife shall have the benefit of the patent during her life; but after her death *J. S.* shall be a trustee for the executor. *2 Vern. 67.*

A man took an assignment of a term in his trustees names, and the inheritance in his own name. It was held, that though by construction in equity the term is attendant upon the inheritance, yet it shall be assets for the payment of debts, as well as a term in a man's own name, is assets at law, but with this difference; that the heir shall have the benefit of the surplus of the trust of a term; and not the executor after debts paid; but if a term be expressly declared by deed to be attendant on the inheritance, it shall not be assets in equity. *Arguendo. Chapman and Bond, Vern. 188, 189. Vide Vern. 1. 104. 2 Ch. Ca. 49, 55, 152.* said to be contrary to former resolutions.

A. seised in fee; in consideration of a marriage portion, demised certain lands to *B.* and *C.* for ninety-nine years at a pepper-corn rent, upon trust that they should re-demise the same lands in

A x

the

the following manner, viz. to *A.* for ninety-eight years and eleven months, if he should live so long, at a pepper-corn rent, and after his decease at the rent of 1500*l.* per *Annum* during the life of his wife, as a jointure for her, and after her decease at a pepper-corn rent during the remainder of the term. *B.* and *C.* redemised accordingly. *A.* died indebted 9000*l.* by bond-debts, and 18000*l.* by simple contract, and left but 6000*l.* personal estate: On a bill brought by the creditors to subject this term to their debts, it was held, that this term being raised for a particular purpose, could not be liable to any other debts than the inheritance was. *Baden and The countess dowager of Pembroke, 2 Vern. 52.*

Bond to pay 500*l.* as testator should by will appoint the money, shall be assets for payment of debts.

J. S. on the sale of lands takes a bond from the purchaser to pay any sum or sums of money not exceeding 500*l.* as he should by will appoint: *J. S.* by will appoints payment of this sum amongst several of his relations. It was held, that *J. S.* having power to dispose of this sum of 500*l.* it must be looked upon as part of his estate, and should be assets liable to the payment of debts. *Thomson and Towne, 2 Vern. 319.*

J. S. has a power to charge an estate with 3000*l.* this shall be assets.

J. S. having by marriage articles a power to charge an estate with any sum not exceeding 3000*l.* for such purposes as he should think fit, by deed appointed the 3000*l.* as a collateral security for the quiet enjoyment of an estate he had sold, and if no incumbrances did appear, the appointment to be void, and by will devised the 3000*l.* to his daughter. It was decreed, that the 3000*l.* should be applied to the payment of the debts of *J. S.* 2 *Vern. 465.* Vide 2 *Vern. 719.* *Vern. 234.*

Where

Where upon the death of one Executor the surplus shall survive.

THE testator had two executors, and devised to them *Residuum Bonorum, &c.* after the debts and legacies paid; one of them died, his administrator sued the surviving executor to have a moiety of the surplus; the defendant insisted, that they took as joint legatees, and not as joint executors. But the lord keeper decreed for the plaintiff, for in case of executors the testator intended an equal share to each; and by the advice of *Rolls* chief justice, it was decreed, that where a devise was to two *equally*, notwithstanding which word *equally*, the devise was joint, yet the intention prevents the survivorship. *Nota*; This decree was to the dissatisfaction of the bar, for where the intention is secret and not declared, the secret intent shall give way to the legal intent. *Cox and Quantock, Ch. Ca. 238.* But the resolutions in equity have been since otherwise; and it seems well settled, that the survivor shall have the whole by law: As where a man devised goods to *A. and B.* and the executor assented to the legacy, and *A.* died, and his executor sued in the spiritual court for *A.*'s share, there being no survivorship in such case by the ecclesiastical law, whereupon *B.* sued a prohibition; and it was adjudged that the prohibition should stand, for by the assent of the executor the interest was vested in the legatees, and became a chattel in them governable by the rules of the common law. *Bastard and Stukely, 2 Lev. 209. Vide Lev. 164. 2 Jon. 161, 130.* A man having devised the surplus of his estate, after his debts paid, to *A. and B.* *A.* died; and it was adjudged in the delegates, and decreed by lord *North* and affirmed by *Jefferys* lord chancellor, that this was a joint devise, and should survive to *B.* and the lord chancellor's opinion was, that if

Whether, when the surplus is devised to the two executors, the survivor shall have the whole.

A. and *B.* had been made executors, and *A.* had possessed a moiety of the goods and died, it would have been all one. *Lady Shore and Billingsly, Vern.* 482. Sir *A. K.* devised the residue of his estate (except a lease after mentioned) to *E.* and *D.* his executors, and to the survivor and survivors of them, to the intent that they should therewith pay his debts and legacies; and he devised the aforesaid lease to his executors, share and share alike, for their care and pains in the execution of his will. *E.* paid the debts and legacies, and died; *D.* survived. It was held, that *D.* should have the residue of the estate (except the lease) as survivor, but that the executors were tenants in common of the lease, and therefore the survivor should not have the whole. *Draper's case, 2 Ch. Ca.* 64. A man devised the residue of his personal estate to two persons, their executors and administrators, and one of them died, his executor brought a bill against the surviving legatee. It was held, that the survivor should take the whole to his own use, and should not be a trustee as to a moiety for the representative of him who is dead, and that they were to be considered as jointtenants where survivorship takes place, as well in cases of chattels as in cases of inheritance. *Trin.* 1729. *Gray and Willis.* The testator devised the residue of his personal estate to three persons, whom he made his executors; one of them died in the lifetime of the testator. The question was, whether the third part should be distributed according to the statute, or whether the surviving executors should have the whole? It was decreed, that the two surviving executors should have the whole. *Trin.* 1730. *Hunt and Berkley.*

Whether

Whether the Executor shall have the surplus of the personal Estate, or be a trustee for the next of Kin?

A. By will devised particular legacies to his children and grandchildren, and 10 l. a-piece to *B.* and *C.* whom he appointed executors, for their care; but made no disposition of the surplus of his personal estate, which amounted to 5000 l. and upwards. The question was, whether the surplus should be in trust for the children, or go to the executors? decreed by *Jefferys* lord chancellor, it shall be in trust for the children. *Mich.* 1687. * *Foster and Munt*, 1 *Vern.* 473. said to be affirmed in the house of lords. 2 *Vern.* 648. *A.* made his will to the following effect, *I dispose of my estate after mentioned, and what else I have in the world, in manner and form following; and then gives several legacies to his relations amounting*

The testator devises legacies to his children, and gives 10 l. a-piece to his executors for their care; they are but trustees as to the surplus.

Testator declaring his intention to dispose of his whole estate, gives near the whole in legacies amongst his

* Various reasons having been assigned for his determination, which is *primæ impressionis*, we have thought fit to collect such of them as have occurred to us. *Wil. Rep.* 7. *Sir Bartholomew Shower*. In *Foster and Munt's* case five witnesses expressly swore, that the testator had declared his executors should not have more than the particular sums bequeathed to them. Note; the fact here does not appear, and though it has been frequently said, that this decree was founded on the fraud made use of by the executors in insinuating themselves into their testator's favour, and prevailing with him to execute his will at a tavern, which indeed appears by the register's book to have been charged in the bill, and insisted on by the counsel for the plaintiffs at the bar; yet it seems as if no fraud was proved, since the reason of lord *Jefferys's* decree is expressed to be "Because the words of the will amounted to a declaration of trust, it being plain the testator never designed the surplus of his estate (upwards of 5000 l.) should go to his executors, for that he gave them 10 l. a-piece, which excluded them from any property the law might cast upon them." *Wil. Rep.* 116. In *domo procerum*, lord *Guernsey* and other lords declared, that the reason upon which the decree of *Foster and Munt* was grounded, was the fraud, and the will's being drawn at a tavern. *Wil. Rep.* 548. *Mr. Vernon*, In *Foster and Munt's* case there was not the least proof of fraud. So said by lord *Harcourt* in the case of *Ball v. Smith*, 2 *Vern.* 678. et vide *P. ec. Ch.* 567.

relations, and 20*l.* to his executors; and after acquires a new personal estate: The executors, but trustees, and the new acquired estate to go amongst the legatees in proportion.

Where the executors have legacies they shall not have the surplus without plain proof of the testator's intention.

Of admitting
parol proof

to near the value of his estate, (as appeared by a calculation of his own hand-writing about that time made), and made *B.* and *C.* executors, and gave them 20*l.* and intreated them to take the trouble of getting in his estate: The testator lived ten years after, and acquired an additional estate, and died, not having altered or new published his will: On a bill brought by the next of kin against the surviving executor, it was decreed, that the surviving executor was but an executor in trust, and that the new acquired estate should go to the legatees in proportion to their legacies, *Lord Com. Rawlinson* rested much on the words, *I dispose of my estate after mentioned, and whatever else I have in the world, &c.* *Trin. 1690. Cordel and Noden, 2 Vern. 148. Prec. Ch. 12.* A man having a daughter and two brothers, made his will, and thereby gave 5*l.* a-piece to his brothers, appointing them executors, but made no disposition of the surplus. The daughter as next of kin brought a bill in chancery against the executors for an account of the surplus; and though there were proofs that the testator intended his executors should have the surplus, in regard that the daughter had incurred her father's displeasure by having married against his consent, yet these being somewhat doubtful, it was decreed first by Sir *John Trevor* master of the rolls, and afterwards by *Lord Sommers* upon an appeal, that the executors should be but trustees as to the surplus, after their legacies paid, and that such surplus should go according the statute of distributions; and it was said by *Lord Sommers*, that equity did delight in equality, and that the distribution according to the statute was most agreeable to natural justice; that it was dangerous to admit of parol proof where there was a will in writing; however, in relation to a personal estate the court would allow of proofs and averments, but then such proofs ought to be plain to intitle an executor

cutor to the benefit of the surplus. Cited *Lady Gainsborough's case*, 2 Vern. 252. Mich. 1695. *Petit v. Smith*, Wil. Rep. 7. Comberb. 378. Com. Rep. 3. 5 Mod. 247. Lord Raym. 86. Stra. 7.

A. devised lands to be sold for payment of his debts, and wills that the surplus shall be deemed part of his personal estate, and go to his executors, and gives to his executors 100 l. a-piece as a legacy: the question was, whether the executors should have the surplus to their own use, or should distribute it according to the statute of distributions? For the executors it was insisted, that the surplus should be part of his personal estate, and go to them, and that he meant it them to their own use; and his giving them a legacy of 100 l. a-piece cannot alter the case, for the surplus perphas might be nothing, and therefore he gave them the 100 l. that they might at all events be sure of something, and not to exclude them of the benefit of the surplus; and this being a devise of the surplus after debts and legacies paid, cannot be a trust in them, for all their trust is performed when debts and legacies are paid: On the other side it was said, that the words in the will, that the surplus should be part of his personal estate, and go to his executors, were only intended to exclude the heir, who else would have had it, and not to give any greater interest to his executors than they would have had otherwise.

The lord chancellor was of the same opinion, and decreed accordingly. Hill. 1697. Lord Bristol and Hungerford, 2 Vern. 524, 645. Prec. Ch. 81.

A. by will gave several legacies therein specified to all her next of kin by name, and likewise gave particular legacies to M. and P. two dissenting ministers, and appointed them her executors, but did not make any express disposition of the surplus of her personal estate: The executors were decreed to account for and distribute the surplus amongst the next of kin of the testatrix. Mich. 1698. Bayley and Powel, 2 Vern. 361. Prec. Ch.

The testator devises lands to be sold for payment of his debts, and that the surplus should be deemed part of his personal estate, and go to his executors, to whom he gives 100 l. a-piece. They are but trustees for the surplus.

Legacies given to all the next of kin, and to the executors, they are but trustees as to the surplus.

Wife executrix having a legacy, decreed only a trustee.

The wife executrix, a new estate acquired, the surplus to be distributed.

The wife executrix having a particular legacy shall distribute the surplus.

When the wife is executrix, a small legacy shall not exclude her from the benefit of the surplus.

20 l. to the executor for mourning, decreed a trustee as to the surplus.

The wife and two other's executors, legacies to the wife and the one executor, and none to the third, the surplus to be distributed.

The wife executrix, and the use of some plate only devised to her: Decreed to have the surplus.

92. The testator made his wife executrix, and gave her an express legacy: By lord keeper *Wright*, the wife decreed a trustee of the surplus according to the statute of distribution. 10 Jan. 13 W. 3. *Randal v. Bookey*, 2 Vern. 425. *Wil. Rep.* 550. cited. A man made his will, and his wife executrix, and lived twenty years after the will, and acquired a new estate; and the the surplus was decreed to be distributed. *Hil.* 13 W. 3. *Ward and Lane*, 2 Vern. 677. and *Wil. Rep.* 550. cited. *Prec. Ch.* 182. Sir *Charles Morly* made his will, and his lady executrix, gave 1000 l. a-piece to his daughters, and some jewels and other things to his lady: Decreed that the executrix having a particular legacy given, should distribute the surplus. *Mich.* 1702. *Pawlet v. Morley*, *Freeman's Rep. in Chanc.* 263. A man devised his library of books to *A.* (except ten books such as his wife would chuse, as plays, romances, sermons, but not law books) and made her executrix. It was decreed by the lord keeper, that she should not by this devise be excluded from the benefit of the surplus of the personal estate. *Trin.* 1704. *Griffith and Rogers*, *Prec. Ch.* 231. *A.* made *B.* his executor, and gave him 20 l. for mourning, and *B.* not being of kin to the testator, the surplus of the personal estate was agreed to be distributed. *Pasch.* 7 *Annæ*, *Cook and Walker*, 2 Vern. 676. cited. *A.* gave 100 l. legacy, and the interest of 300 l. to his wife for her life, and made her and *B.* and *C.* executors, and gave to *B.* 20 l. for mourning: The surplus was decreed to be distributed. *Trin.* 7 *Ann.* *Durwell and Bennet*, 2 Vern. 677. cited. The late *Duke of Beaufort* by his will gave several specific legacies to all his children and grandchildren, and devised the use of his silver plate for the service of his table, to his dutchess for her life, and afterwards to his grandson the now duke, and appointed his dutchess executrix, without making any express disposition of the surplus. The question was,

was,

was, whether the dutchess the executrix should have the surplus, or whether it should go according to the statute of distributions? after solemn argument lord chancellor *Cowper* decreed the surplus to be distributed amongst the next of kin, upon the authority of *Foster and Munc's* case. It was allowed, that had there been plain proof of the testator's declaring or intending his wife to have the surplus, this would have intitled the wife thereto, even though such proof was but parol proof; for the wife, as executrix, had the legal title to the surplus; and this parol proof would be only to rebut an equity arising to the next of kin, by reason of the express legacy given to the executrix, but that the proof in the present case of the duke's intent was altogether doubtful and uncertain: But afterwards, on an appeal brought by the dutchess, the executrix, *in domino procerum*, this decree was reversed. *Hil. 1709, Lady Granville v. Duchess dowager of Beaufort. Wil. Rep. 114. 2 Vern. 648.* Upon the decree of reversal in the house of lords, lord keeper *Harcourt* founded his decree on the case of *Ball and Smith, quod vide postea.* The testator by his will forgave *A.* a debt of 50*l.* gave him 50*l.* more, and some household goods to the value of 100*l.* and made *A.* and *B.* executors. *B.* insisted to have the surplus to himself, upon pretence, that the testator having given the other executor these specific legacies intended him no more, and that so the whole surplus would belong to him. *A.* insisted that *B.* was a mere stranger and himself a near relation of the testator; that he gave him these legacies only that he might at all events be sure of something; that he took these legacies in another capacity than as executor, and so they could not exclude him of his share of the surplus which the law casts upon him as executor: The lord keeper was clearly of this opinion, and that it was a much greater question, whether this devise of particular legacies to one executor did

Parol proof.

A legacy given to one executor, and none to the other, this, as to his companion, shall not exclude him of his share of the surplus.

Executor, tho' a stranger, and had considerable legacies, decreed to have the surplus on parol proof of the testator's intentions,

The wife executrix, a long term of years devised to her for life, with a contingent interest in remainder in a third part of it, yet intitled to the surplus.

The wife executrix, and legacies given to her of things which were her own before the marriage as executrix to a former husband, decreed the surplus.

did not exclude both from any share of the surplus; but this not being the point in question, he made no decree concerning it, but decreed *A.* an equal share of the surplus of the personal estate. *Hil. 9 Anna, Coleworth v. Bangwin, Gilbert's Rep.*

79. The testator appointed one who was not of kin, but a stranger to him, executor, and gave him very considerable legacies: Sir Peter King decreed in the mayor's court in favour of the testator's two brothers, that the surplus should be distributed: Upon an appeal in the house of lords the decree was reversed, they allowing that parol proof ought to be received in favour of the executor's title consistent with the will, which proof was full as to the testator's frequent declarations, that his executor, though a stranger should have the surplus. *May 1711. Littlebury and Buckley, 2 Vern. 677. 2 Mod. Ca. 10.* *A.* possessed of a lease for a long term of years, by will devised it to his wife for life, and after her death, to the child she was then *ensient* with; and if such child died before it attained the age of twenty-one years, then he devised one third of the said term to his wife, her executors and administrators, and the other two thirds to other persons, appointed his wife executrix and died: The lord keeper decreed, that the wife was intitled to the surplus of the personal estate against the next of kin, notwithstanding the devise to her of part as aforesaid. *Mich. 1711. Jones and Westcomb, Gilbert's Rep.*

74. *Prec. Ch. 316.* *A.* was executrix of *B.* her former husband, and after married *C.* who by his will in 1686. devised to her the plate and goods she brought him in marriage, two silver salvers in lieu of plate that had been changed away, and made her executrix and died, leaving a daughter by a former wife, and his wife *ensient* of a daughter; and there being no devise of the surplus of the personal estate, the question was, whether she should take it as executrix to her own use, or liable to distribution? The lord keeper decreed the surplus

to the wife, as well for that this will was made before the case of *Foster and Munt*, as also for that in this case nothing was devised to the wife but what was her own before, and as she was executrix to her former husband; but his lordship said he was content to have this considered as a legacy given by the husband, and said, where a wife is made executrix, it is to be presumed she is not made so to have barely an office of trouble but of benefit, to take the surplus. *Hill. 1711. Ball and Smith,*

2 Vern. 633, 675. William Allen being possessed of a personal estate of the value of about 2000*l.* the day before his death made his will, and devised several legacies to his relations, and to his sister the wife of the plaintiff *Batchelor*, about 1000*l.* and gave 70*l.* to one Mr. *Serle* and his wife, and their four children, to buy them mourning, and gives to Mrs. *Sarah Serle* (one of their daughters, to whom he had made his addressees by way of marriage) 500*l.* and to Mr. *John Serle* his horse and furniture, and his cloaths to be disposed of by his executors; and then concludes, as to the 700*l.* he is intitled to in the *South Sea* company, and the rest of his personal estate, he wills that the same shall be sold for payment of his debts and legacies, and he appoints the said Mr. *John Serle* and M. *Thomas Serle* executors, and dies: The executors *John* and *Thomas Serle* were two of Mr. *Serle*'s children, and intitled to their proportion of the 70*l.* devised for mourning, but were no ways related to the testator: The question was, whether the surplus of the personal estate should go to the executors, or be in trust for the sister the only next of kin? It was, in proof that the testator did not so much as consider whom he should make his executors till he had disposed of all the legacies; that the testator being asked whether he would not give his sister more, answered he would not; then being asked who should have the surplus, or what should become of the surplus, he said his will should stand as it was; that he had a very great regard for the

A legacy of 1000*l.* to the sister and only next of kin, and small legacies to the executors, the surplus decreed to the executors on parol proofs.

executors

Legacies to the
executors, the will
unfinished, they
are but trustees
for the surplus.

executors family, and was to have married their sister: The lord chancellor was of opinion, that the proofs being in affirmance of the disposition, ought to be read, and said that they were so full as to make an end of the case; that without a strong and violent implication the executors ought not to be defeated of the *residuum*; that here was no such implication in this will, but rather the contrary; that to make sense of the last clause, it must be construed a devise of the *South-Sea* stock, and the rest of his personal estate to his executors; for it immediately follows, *and I make John and Thomas Serle my executors*, which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent presumption to induce any other construction, he could not give into so great a change of the law, but must decree for the executors. *Hil. 1716. Batchelor and Serle, 2 Vern. 736. Gilb. Rep. 125. Anthony Upton* made his will, by which (*inter alia*) he declared as to his personal estate (if he should leave any) that he gave 50*l.* thereof to his brother *A.* and 50*l.* to his nephew *B.* and made the said *A.* and *B.* executors, and gave 20*s.* a-piece to others of his relations, several of whom were his brothers, nephews and nieces, and as such his next of kin in equal degree within the statute of distributions; after which the testator abruptly broke off without saying *in witness whereof, &c.* or making any disposition of the surplus, which amounted to about 1200*l.* All the will was wrote with the testator's own hand, though not signed by him: They who were in equal degree with the executors, brought a bill to have their shares of the surplus according to the statute. *Lord Chancellor*: The making a person executor, ought not to amount to a gift of the testator's personal estate; it is no more than making him a trustee; the word executor imports *ex vi termini*, that he was only appointed to execute the will: If I make *A.* my executor, and say

say no more, and *A.* dies intestate, without disposing in his life-time of the whole personal estate, my next of kin, and not the next of kin of *A.* shall have the administration *de bonis non*, together with all my personal estate; whereas if I make *A.* my executor, and also give him my personal estate and die, and afterwards my executor dies intestate without disposing of my personal estate, the next of kin and administrator of my executor shall have this personal estate, and not my next of kin; which is a demonstration that the making a man executor is not giving him the personal estate; for in the one case only, where the personal estate is given to the executor, on the death of such executor shall his next of kin have the personal estate, but not in the other: By the statute of distribution the succession to the personal estate is as much settled and fixed in the next of kin (where it is not disposed of by the will) as by the common law the title to the real estate is fixed in the heir, if not given away by the will; and therefore it might in reason be a question, even if there was no express legacy given to the executor, nor any disposition of the surplus by the will; for it seems within the reason of the case, where a man by his will devises his real estate to *J. S.* for the payment of his debts, after payment thereof the devisee is clearly but a trustee for the heir: Even so by making an executor, I make him a trustee of my personal estate for the payment of my debts, and if I do not give him the surplus, why should not such an executor, *pari ratione*, be a trustee for my next of kin? But this may be carrying it too far: However, where the testator by express words has said that his executors shall have 50*l.* a-piece out of his personal estate, it were offering violence to the will for a court of equity to say such executors should not only have 50*l.* a-piece, but all the rest of the personal estate; this would be indeed saying that such executors should have all and some: An executor has nothing in his own right but what is expressly

expressly given him by the will, and so differs from an heir, who is seised in his own right; and it is most reasonable, that where a testator gives his personal estate from his nearest relations, *he should say so*, else why should it be presumed? Besides, this case is the stronger in regard the will is plainly an imperfect and unfinished will; and it is not to be imagined but that if the testator had completed it, he would have given a competency to his next of kin, which he has here not done: Upon the whole, here being an express legacy of 50*l.* to each of his executors, and no disposition of the surplus of the personal estate, the executors are but trustees with respect to the surplus, which must go to the next of kin according to the statute of distribution. *Trin. 1719. Farrington and Knightly, Wil. Rep. 544. Prec. Ch. 566. 10 Mod. 442. 2 Eq. Cas. Abr. 421. pl. 2.* Lord chancellor *Parker* decreed in favour of the next of kin purely on account of legacies being given to the executors for their trouble in the execution of the will, (though there was also some parol proof of the testator's intention in favour of the executors, but not clear). *24 Feb. 1720. May*

Legacy to the executor for his trouble, excludes him from the Benefit of the surplus.

Executor, tho' he had a legacy and was no relation, decreed the surplus on proof of the testator's intention.

Parol proof of the testator's intention will not intitle the executor to the surplus, where there is a legacy expressly given him for his care and trouble.

v. Lewin, 2 Williams 159, 162. cited. Though a legacy was given to the executor, who was no relation, yet was the surplus also decreed to him by the master of the rolls, upon proof read of the testator's intention that it should be so. *Pasch. 1723. Heron v. Newton, 2 Wil. Rep. 160. cited.* *Mary Smallman* possessed of some personal estate, by will gave to her nearest relations 5*l.* a-piece, and made one *Careless*, who was not related to her, sole executor, giving him 5*l.* *for his care in fulfilling her will*, and made no disposition of the surplus and died: There was some slight proof for the next of kin, who now sued for the surplus of the personal estate; as that the testatrix had declared her intentions were to give the surplus of her personal estate to her next of kin, in the same manner as her husband had disposed of the surplus of his personal estate

estate to his next of kin; but the person who drew the will, swore that the testatrix, at the time of the making thereof, declared her intention to be, that if she left any surplus, her executor, who had been her very good friend, should have it, for that her relations had been ungrateful to her; and this person swore, that the testatrix had directed him to give the surplus to her executor, and that he would accordingly have done this by express words, but that he thought it would be unnecessary, the law implying as much. *Mr. Justice Powis*, (in the absence of the lord chancellor): The words of the will seem to declare a trust by giving the 5*l.* legacy to the executor *for his care in fulfilling the will*, and this goes beyond all parol proof: On an executor's dying intestate, so much of the testator's personal estate as remains unadministered, must go to the testator's next of kin, viz. to the administrator *de bonis non*, &c. and not to the administrator of the executor: If a man marries an executrix, and she dies intestate, the testator's personal estate must go to the administrator *de bonis non*, and not to the husband: A plaintiff executor pays no costs, but this not by any express words of the statute (23 H. 8. c. 15.) but only by an equitable construction, because what he recovers is not for himself, but in trust for his testator: He did not deny but that where there was an express legacy given to the executor, and no further words, nothing given for his care and pains, parol evidence might, in such case be admitted of the testator's intention; but this was not to be minded where words followed declaring a trust; as where the legacy appeared to be given to him for his care *in fulfilling the will*; that if money was to be granted or devised for the doing of any thing, this, in equity, would create a trust, and here the legacy was given to his executor for his care, &c. That indeed here was the evidence of the person who drew the will, tending to prove that the surplus was designed for the executor, which

which nevertheless was contradicted by evidence on the other side; however less regard ought to be had to evidence of this kind in cases of wills than of deeds, it being usual for many under such circumstances, to play the *Volpone*, and to speak what they do not really intend, to get every one's favour: He relied on the case of *May v. Lewin*, as being the latest and therefore the greatest authority; and said besides, the defendant was made executor in the same clause, which gave him the legacy, whereby it should seem that the legacy was annexed to the executorship, as all the reward intended for it: Decreed a distribution amongst the next of kin. *Trin. 1723. Rackfield v. Careless*, 2 *Wil. Rep.* 158. 9 *Mod.* 9. 2 *Mod.* 9. 2 *Eq. Cas. Abr.* 416. pl. 8. The lady *Rachel Manners* made her will, in the beginning of which mentioning of what her estate consisted, and that she intended to dispose of the same by her will, she gave to every one of her brothers and sisters, and also to her half-brothers and sisters, pecuniary legacies, particularly to her eldest brother the duke of *Rutland* 500*l.* after which she made no disposition of the surplus of her personal estate, but left the duke sole executor: There was a very strong evidence of the testatrix's intention at the time of making her will, that her executor should have the surplus. *Lord Chancellor*: As I have several times decreed it, so I think it grounded on the greatest reason and justice, that where there is an express legacy given to an executor, and no devise of the surplus, such surplus shall go according to the statute of distribution to the next of kin: As to the executor's being intitled thereto, it might with equal reason be said, that where the spiritual court grants administration to a person, this shall intitle the administrator to the surplus after debts paid; whereas neither executor nor administrator have any legal interest in the personal estate, but are vested only with a legal power over it, just as every trustee has a legal power

Legacies given to all the next of kin, of whom the executor was one, decreed the surplus on positive proof of the testatrix's intention.

power over his trust estate: If an executor or administrator had any legal or beneficial interest in the personal estate, they would by consequence have a power of devising it by will; but it is plain they cannot devise it: Nay, it is demonstrable that an executor has no legal interest; because when an executor dies intestate, whatever is his, will go to the administrator; whereas all the personal estate of his testator will belong to the administrator *de bonis non, &c.* and not to the administrator of the executor; *scilicet* if the executor be also residuary legatee; which shews, that whatever the executor has as executor, is only *jure alieno*; and it is no argument to say, that as when I make such a one my heir, I give him my real estate; so by the same reason, by making him executor, I give him my personal estate; for the heir is sued in the *debet* and *detinet*, but the suit against the executor must be in the *detinet* only; and the assets are said to be *bona testatoris*, and not *bona executoris*; and the appointing one executor, is only appointing him to execute the will of the deceased: The difficulty would be to maintain, that if one should make a man executor, without either disposing of the surplus, or giving any express legacy to the executor, such executor should have the surplus; but it having been held, that where no express legacy has been given to the executor, he will be intitled to the surplus; and on the other hand, that the having given a legacy to the executor, implies he shall have *no more*, for that otherwise he would have *all and some*: I will not alter these resolutions. Giving to the next of kin express legacies, even though it be to all the next of kin, will not exclude them from coming in for the surplus upon the statute of distribution; and there is still much less reason for it where the legacies to the next of kin are unequal: The court has frequently shewn this favour to the executor, to allow parol evidence in proof of the intention

Of allowing parol evidence.

Express legacy to the next of kin, and an express legacy to the executor, surplus decreed to the executor.

of the testator, to rebut that equity which otherwise would be in favour of the next of kin: Here the evidence is very strong, that the testatrix intended the surplus to the executor, and this is evidence of the declaration of the testatrix at the time of making the will: The testatrix, reciting her personal estate in the beginning of her will, declares her intention to dispose of it, which must be understood of her intention to dispose of the whole: I own, that the allowing of parol evidence is exceedingly dangerous, and not to be done in case of discourses at different times from that of making the will; but yet abstractedly from that case parol evidence may be admitted. (*Cheney's case*, 5 Co. 68. *Litton v. Litton*, 3 Ch. Rep. 169. 2 Vern. 621. *Ball and Smith*, 2 Vern. 675. cited.) Surplus decreed to the executor. *Hil. 1723. Duke of Rutland v. Dutcheffs of Rutland*, 2 Wil. Rep. 210. 2 Eq. Cas. Abr. 416. pl. 10. 440. pl. 41. One having a sister, who was next of kin, and having several sums of money in the *South Sea and Bank*, made his will, whereby he devised 100*l.* *per Annum* to his sister for life, and the residue of his bank stock to his executor, and devised ——— *per Annum* out of the *South Sea* stock to ———; remainder of his stocks to ———; he devised the furniture of his house to his executor and the heirs of his body, giving an express legacy of a sum of money to his sister, and making one, who did not appear to be any relation to him, executor, but there was no disposition of the surplus of the personal estate: On the death of the testator the question was, how the residue of the personal estate should go? Lord chancellor King: I could wish an act of parliament were made to reduce this point to a certainty; for if it were once settled either way, it would be well enough; but in the present case, if the express legacy to the executor be allowed to exclude him from taking the surplus, by the same reason

reason the express legacy to the next of kin will bar her likewise ; and then, here being exclusion against exclusion, the law must take place, and the executor have the surplus as executor : As to what has been urged, that if an executor dies intestate, all the personal estate, the property whereof is not altered, shall go the administrator *de bonis non, &c.* and not to the next of kin to the executor ; this is true, because from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault that he did not, as he might, alter the property : But the law says, and the general notion of mankind is, that the making a man executor is giving him all, which is the less to be wondered at, when it is considered that personal estates were not near so large formerly as they are at present : Accordingly it was decreed, that the executor should take the surplus as executor ; though Mr. *Lutwyche* said this would shake many precedents. *Hil. 1725.*

Somner v. Hooker, 2 Wil. Rep. 338. 2 Eq. Caf. Abr.

441. pl. 45. A will was begun, and by it several legacies given to the next of kin, and likewise to the executors, and then at the beginning of the next sentence the will stopped, and was left unfinished. *Lord Chancellor* : The testator having given the executors a legacy, it is most likely he would have given away the residue from them ; therefore let the surplus be distributed according to the statute of distributions. *Hil. 12 Geo. 1.*

Legacies given to the executors, and the will unfinished, residue to be distributed.

Knewell and Gardiner, Gilbert's Rep. 184. Martha Hill having no children, but several nephews and nieces, devises legacies to all her nephews and nieces except one ; and then says, she gives to her sister *Sall* (wife of *Francis Sall*) all her household goods and chattels, &c. she says too, she gives the same to the said *Francis Sall* and *Judith* his wife for life, and after her decease she gave a moiety thereof to *M. S.* and *J.* and appointed *Francis* and *Judith Sall* executors. Decreed by the master of the rolls, that *Francis Sall* was not

Legacy given to the executor, held to be but a trustee of the surplus.

The testatrix made her daughter a feme covert executrix, having given her a legacy in trust for her separate use, exclusive of her husband, she is intitled to the surplus.

intitled to the surplus: The general rule upon this head is, that where a particular bequest is given to the executor, the court presumes that the testator intends that he shall be a trustee of the surplus. *Pasch. 1740. Willis and Brady, Barnard. 64. Grace Lawson* a widow having one son, *William Lawson*, and two daughters, *Alice* the wife of *Reynold Newstead*, and *Elizabeth* the wife of *Allen Johnston*, and being in partnership in the cloathing trade with her son-in-law *Allen Johnston*, by her will directed 1000 l. to be taken out of her stock, and laid out in the purchase of lands for the benefit of her son *William*, gave a legacy to her daughter *Alice*, and directed that the residue of her joint stock should be invested in the hands of *John Senior*, his executors, &c. desires he may become a partner with her son-in-law *Allen Johnston*; and as to *Senior's* share of the profits, declares the same shall be in trust for her daughter *Elizabeth* for her separate use, exclusive of her husband, during her life; and after her decease to such persons as the said *Elizabeth* should give the same by her will or other instrument in writing, and made the said *Elizabeth* executrix: The question was, whether *Elizabeth*, notwithstanding the legacy of the stock given in trust for her benefit, was as executrix intitled to the surplus of the testatrix's personal estate, or was only a trustee of it for the benefit of the next of kin? The lord chancellor said, that the authorities on this head had been various, and some of them clashing with one another, but that the present case was a very plain one, namely, that the executrix is not excluded of the surplus; the rule of law is clear on that side of the question, and the rule of the ecclesiastical court is clear on the same side: The ecclesiastical courts have indeed attempted to make an executor distribute the surplus when he has had a legacy given him; but as often as they have so done they have been prohibited: This shews that the ground

of this court decreeing the surplus in such case to be distributed, is founded on considerations of equity, and on some fact; from whence arises a violent presumption amounting to evidence, that the executor was only to be a trustee. The first case on this subject was that of *Foster and Munt* in the time of lord *Jeffreys*, the tradition of which case he has heard to be, that lord *Jeffreys* thought there was something of fraud in the party's getting to be made executor, though no particular evidence was given of a fraud; and besides, lord *Jeffreys* thought it absurd, that when the executor had a legacy of 5*l.* given for his trouble, he should claim the residue of the estate to his own benefit: From this time it has been taken, that where an executor has had a legacy given him for his care and trouble, and no disposition of the surplus, he should be but a trustee of it: But the first cases of this kind were only where a legacy was given the executor for his care and trouble; afterwards the court carried the matter further, and in general held, that where a legacy was given the executor, he should be but a trustee of the residue; and the foundation of that opinion was, that giving him a particular legacy, implied he was to have no more: The case of *Farrington and Knightley*, in the time of lord *Macclesfield*, was to that particular purpose, and that is now the settled opinion; however several distinctions have been endeavoured at to take cases out of this general rule on account of the executor's being nearly related to the testator; but this distinction has been over-ruled; it was denied in the case of *The Lady Glamvil* and *The Duchess of Beaufort*; but in the case of *Ball and Smith* in the time of *Lord Harcourt*, such distinction did prevail in favour of a wife who was made executrix; and his lordship said he did believe, that in the case of a wife such distinction has prevailed since: As to the present case, that which he founded his opinion upon was, that this was a legacy given in trust for the separate use of

the wife, exclusive of her husband, and as it was a legacy of this kind, no inference could be made from thence that she was not to have the residue for her own benefit; for though the testatrix had intended that the executor should have the whole, yet as she designed that the moiety of the stock in trade should be for the separate use of the executrix, exclusive of her husband, there was a necessity of vesting this legacy in the particular manner that it was done; and whenever that is the case, no conclusion can be drawn from an executor's having a particular legacy given him, that he was not designed to have the benefit of the rest; and this opinion falls directly within the reason of the case of *Griffith and Rogers*, and that of *Lady Glanvil* and *The Duchess of Beaufort* before-mentioned; the last of these cases came before *Lord Cowper*, and that was reversed in the house of lords: An objection indeed has been made, that barely giving a legacy in trust, ought not to be a foundation for such a distinction; and so far indeed it is true, that if this was barely a legacy of this sort, it ought not to make a distinction; but this is not barely giving a legacy in trust, but a trust of a particular kind, and absolutely necessary to be made to answer the purpose which the testatrix intended. 15 July 1740. *Newstead and Johnson, Bernard.* 94. *Vide antea* fo. The case of *Starkey v. Brookes*.

This point, how far the executor shall be intitled to the surplus, although he be not by the express words of the will appointed residuary legatee, having been long litigated; in the year 1725, *King*, then lord chancellor, brought a bill into the house of peers (which passed that house) to settle the point: but it was thrown out by the house of commons. The bill was to have settled it for the benefit of the executor. *Stra.* 569.

But since that time, the general rule seemeth to have been, that where executors have legacies given

given them, and the surplus is not specially devised, they shall be trustees of the surplus for the next of kin, unless there appear in the will special circumstances of the testator's intention to the contrary. 2 *Atk. Rep.* 45. pl. 36. 2 *Burn's Eccles. Law* 579. *Barnard. in Chanc.* 94.

The testator gave a pecuniary legacy to *A.* and another of a different value to *B.* both infants, and made them executors. The question was, as to the residue of his personal estate, whether it should result to the next of kin, or go to his executors. By the lord chancellor *Hardwicke*: Though the law casts the whole personal estate upon the executor; yet as a will is to be construed chiefly according to the intention of the testator, if it appear manifestly his design that the executor shall not have it, it shall be distributed by this court. As where a specific legacy is given to an executor, he shall not have the residue; as it would be absurd to think, that the testator after he had given him what he thought convenient, should also intend to give him the whole residue, which would include the particular legacy. Yet in many cases this construction may be improper; and therefore the rule of law has been suffered to take place. As in the case of *Griffith and Rogers*, where the executrix had a specifick legacy of ten books. And in the case of *Jones and Westcombe* (*Prec. Ch.* 316.) where a man, possessed of a long term, devised it to his wife for life, and after her death to the child she was then enſient with, and made her executrix. For in this case it was necessary to devise the term to her specifically, for the sake of the limitation to the child. In the present case, not to mention that it is improbable the testator would have made these persons who are infants his executors, merely for the purpose of distributing his personal estate, without any benefit to themselves; it was very proper he should give them these legacies, though he might intend they should after have

the residue ; for they do not take the legacies, as they will the residue ; for this they are intitled to jointly and equally, and the survivor will take the whole. But the legacies are unequal in value, and their interest in them different and separate. And it cannot be inferred, that the residue includes the particular legacies ; for as they are bequeathed, the legatees are intitled to them in severalty, and with different interests ; whereas if he had not separated them, they would have devolved jointly, and otherwise than be intended they should. And he decreed the residue to the executors. *Blinkhorn and Teast, 2 Burn's Eccle. Law 582.*

What Debts ought to be first paid.

Safe way to file a bill in chancery.

WHERE a testator is much indebted, and the executor is desirous to be rid of the assets, the executor's safest way is to file a bill in chancery against the creditors, to the end they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment. *2 Vern. 37.*

A statute for performance of covenants not forfeited, cannot be pleaded in bar of a bond,

If the testator had acknowledged a statute for the performance of covenants in certain indentures, yet the executor cannot plead it in bar of an action of debt upon an obligation, the statute not being forfeited at the time, because it is uncertain whether ever it will be forfeited. *Harrison's case, 5 Co. 28. b. Bridgman 80. Roll. Rep. 405. contra, Woodcock and Fox, Goulf. 142. sed vide Moor 752. pl. 1034. Bulst. 22, 101. Cro. Eliz. 467. Ow. 72. Cro. Jac. 9. 35.*

Aliter of a recognizance for payment of money at a future day.

If the testator had acknowledged a recognizance with condition for payment of a less sum at a day to come, the executor may plead this recognizance in bar of an action of debt upon an obligation, though the day of payment by the condition of the recognizance be not yet come, because this is

a duty presently and certain, in as much as the condition is for the payment of the money. *Robson and Francis, Bridgman 79, 80. 1 Roll. Rep. 405.*

If the condition of the recognizance be for the payment of 100*l.* to an infant when he comes to his full age, this recognizance during the infancy, is not any bar of a debt upon an obligation, because it is uncertain whether any thing shall be ever due upon the recognizance, for the infant may die before his full age, and then nothing shall be paid. *Robson and Francis, Dubitatur, Bridgman 79, 80. Roll. Rep. 405.*

How if for payment of money upon a contingency.

If the testator acknowledges a recognizance in nature of a statute staple, of which the defeazance is, That whereas the conusee and the testator were bound in an obligation to *B.* a stranger, for the debt of the testator, and as his surety, with condition for payment of 100*l.* at a day yet to come; it is granted by the said defeazance, that if the testator, his executors or assigns, pay the 100*l.* at the day, then the statute shall be void; and though this be a collateral sum to be paid to a stranger to the statute, and not to the conusee, and so no duty to the conusee, and perhaps the heir of the testator will pay the money at the day; yet in as much as it is for the payment of money certain, for which by intendment the executor will be charged, the executor may plead this statute in bar of an action of debt upon an obligation before the day comes. *Goldsmith and Sidnar, Cro. Car. 362.* A recognizance in chancery must be paid before a debt on a bond. *Vaugh. 103.*

How if for payment of a collateral sum at a day to come to a stranger.

Where there are two debts on specialties, and of one the day of payment is past, and of the other the day of payment is not come, he cannot pay that debt of which the day of payment is not come before the other. *Doctor & Student 77. b. 9 E.*

Of two specialties for payment of money, one at a day past, and another at a day to come.

If there be several debts due to several persons by obligations or by contracts, and for the one of the debts an action is brought, the executor, administrator or ordinary, cannot pay the other debt for which no action is brought. *Doctor and Student* 77. b. *Cro. Jac.* 9. 2 *Vern.* 300.

If there be two actions brought against an executor, one by *A.* and another by *B.* the executor may pay that debt of which he had first notice of the action brought, though this writ was last purchased. 3 *D. A.* 393. p. 8. This must be intended before he had notice of the other. *Moor* 678. p. 926, 173. p. 306. *Leon.* 312. 2 *Leon.* 60.

Pending actions of equal degree, executor cannot pay one, but may confess judgment on one.

If there be several actions of equal nature brought against an executor, he cannot pay any of them before the other pending the actions, 3 *D. A.* 393. p. 9. but he may confess judgment on any of the actions though it was brought after the others. *Doctor and Student* 77. b. *Keilway* 21 *H.* 7. 74. 9 *E.* 4. 13. *Moor* 678. pl. 926. *Carl.* 228. *Sid.* 21. *Keilw.* 74. b. *Moor* 173. pl. 306. 1 *Leon.* 69. 2 *Vern.* 300. *Jon.* 91, 92. And the plaintiff cannot reply, that the last action was brought by fraud, without traversing that it was for a just debt. *Wilcox and Green,* *Moor* 705. pl. 984. *Cro. Eliz.* 462. *Brownl.* 50. *Lutw.* 662.

Executors must take notice of debts upon record at their peril.

Executors at their peril ought to take notice of debts upon record, and pay them first; and though a recovery be in another county than where the testator and executors inhabited, it is not material. *Littleton and Hibbons,* *Cro. Eliz.* 793. 2 *And.* 157, 158. 3 *Mod.* 113. But where executors shall be excused for want of notice, *vide Keilw.* 51. a. *Moor* 37. pl. 122.

Bonds before simple contract,

Debts by bond shall be paid before debts by simple contract. 9 *Co.* 88. b.

Though conditioned to pay money at a day to come,

So if the condition of a bond be to pay money at a day not yet come, it ought to be paid before

a debt by simple contract. *Leman and Fooke*, 3
3 *Lev.* 57.

Executors may pay statutes or bonds in which they were jointly and severally bound with their testator, *Rogers and Danvers*, *Mod.* 165. and it was common for executors, upon *plene administravit* pleaded, to give in evidence payment of such bonds, and sometimes such persons were made executors for their security.

An executor may pay a debt upon simple contract before a bond of which he had no notice. *Horman and Horman*, 3 *Mod.* 115. *sed quære* 2 *And.* 159. *Mod.* 175. *Vaugh.* 94. 3 *Lev.* 115. *Sid.* 230. *Fitzg.* 78. *Cro. Jac.* 535. 2 *Vent.* 360. *Comb.* 35. May pay a debt on simple contract before a bond of which he had no notice.

An executor sued for rent due in the life of the testator on a parol lease, cannot plead thereto a bond entered into by the testator, and that he hath no assets *ultra*. *Newport and Godfrey*, 3 *Lev.* 267. Cannot plead a bond against debt for rent in the life of the testator.

The contract remained in the realty notwithstanding the term was determined. But on such a bond to himself he might have retained. *Salk.* 326. A debt by specialty is equal, but not superior to a debt for rent. *Salk.* 326. 4 *Mod.* 44. 2 *Vent.* 184. *Comb.* 183. The lease was determined in the life of the testator.

If an executor pleads several judgments, and the plaintiff confesses the plea to be true, and prays judgment of assets *in futuro*; if assets after come to the executor, he may satisfy the judgments pleaded, for the judgment of assets *in futuro* is only to be paid after the other judgments. *Parker and Atfield*, *Salk.* 312. On a plea of several judgments the plaintiff takes judgment of assets in futuro, he shall be paid after the other judgments.

If a man acknowledges a statute to one, and after another recovers a debt against him, and after he dies, the executor ought to satisfy this judgment before the statute, because it is more worthy, for in a *scire facias* against him upon the judgment, it is no plea for the executor to plead the statute acknowledged by the testator before the judgment. Judgment to be paid before a statute.

judgment. *Bond and Bayly, Conny and Baron*, 3 *D. A.* 394. *R.* p. 1.

But yet if the goods of the testator are taken in execution upon the statute, this being without the consent of the executor, and no act or folly in him, in a *scire facias* brought upon this judgment he may plead it. 2 *And.* 157, 158. *Yel.* 29. *Cro. Eliz.* 734, 822. 2 *Brownl.* 30, 81, 82. 4 *Mod.* 248. 6 *Mod.* 144. 4 *Co.* 60. a. 5 *Co.* 28. b. *Brownl.* 101. *Yel.* 133. *Dyer* 80. a. *Leon.* 328. 3 *Leon.* 270. *Leon.* 329. 3 *Leon.* 271. If a man recovers a debt against *B.* and after *B.* acknowledges a statute to *C.* and after makes his executor and dies, the executor ought first to satisfy the judgment, and not the statute which became due after the death of the testator, for the judgment is more high. *Dubitatur.* *Beerbrook and Read, Cro. Eliz.* 734. 822. *Yel.* 29. 2 *Brownl.* 39, 81, 82. 2 *And.* 157, 158. 4 *Co.* 60. 5 *Co.* 28. b.

When the testator dies after a verdict against him, and before the day in bank, the judgment shall be paid as a judgment in his life-time.

The plaintiff had a verdict at *Nisi prius*, the defendant died before the day in bank, and according to the statute 17 *Car.* 2. c. 8. judgment is entered against him; this ought to be paid as a judgment in the life of the testator. *Brunet and Holden, Raym.* 210. *Lev.* 277. *Mod.* 6. 6 *Mod.* 144. But as to a judgment given by force of the statute 8, 9 *W.* 3. against an executor whose testator died after an interlocutory judgment against him, *vide* 6 *Mod.* 142. *Salk.* 315. and 42.

No precedency in judgments had against the testator.

If *A.* recovers against *B.* and afterwards *C.* recovers against him, and after *B.* dies, his executor may satisfy which of the judgments he pleases, *scilicet* the later judgment if he will, for they are all one as to him. 3 *D. A.* 395. p. 3. There is no precedency between one judgment and another had against the testator, and priority of time is not material, but he who first sues execution must be preferred, though before execution sued the executor may pay which he will first, yet if each

each brings a *scire facias*, the executor may confess the action of which he will first, though one *scire facias* was brought before the other. 3 *D. A.* 395. p. 4. 1 *Leon.* 329. 3 *Leon.* 270. But if there be two judgments given against an executor, that judgment which was first given shall be first executed. *Leon.* 329. 3 *Leon.* 270.

Twisden said, that it had been held, that when an executor was so sued, that he might have abated the writ, and did not, but suffered judgment, it was a *devastavit*, though then held otherwise. *Sid.* 404, 408. et vide *Cro. Eliz.* 471. *Brown.* 18. 2 *Brownl.* 185. *Vaugh.* 95, 100. *Vent.* 199.

So much of the goods of the testator as are sufficient for his funeral, may be employed to that use before debts or legacies. 37 *H.* 6. 30, 28. Funeral expences, according to the degree or quality of the deceased, are to be allowed of the goods of the deceased before any debt or duty whatsoever, for that is *opus pium & charitativum*. 3 *Inst.* 22. In strictness no funeral expences are allowable against a creditor, except for coffin, ringing the bell, parson and clerk, and bearers, but not for pall or ornaments. *Salk.* 296. *Comb.* 342. *Holt* said, 10*l.* was enough to be allowed for the funeral of one in debt, (*q.* if it should not be 10*s.* for) it was said baron *Powel* in his circuit would allow but 11*s.* 6*d.* in the like case, which he said was all the necessary charge.

Rent reserved upon a lease which before due from the executor, ought not to be satisfied before judgments or other debts of the testator, for this is the proper debt of the executor, for the action shall be brought against him in the *debet* and *detinet*. *Vide Hargrave's case*, 5 *Co.* 31. *Vide 2 D. A.* 504. p. 10. 3 *D. A.* 395. *S. p.* 3.

A judgment in the life of the testator ought to be satisfied before any debt, for if the executor suffers a judgment against him at the suit of another,

How funeral charges to be allowed.

Rent incurred in the executor's time, ought not to be paid before judgment.

A judgment in the life of testator must be first satisfied.

ther, and execution, it is a *devastavit* if he had not sufficient. 21 E. 4. 21. b.

So a debt of record to the king

The law is the same if the testator be indebted of record to the king: This is in nature of a judgment, and therefore it ought to be first satisfied. 21 E. 4. 21. b. *Bro. Prerog.* 71.

How far a decree in equity binds.

A decree in equity obliges executors in equal degree at least, with a judgment at common law. *Shastoe and Powel*, 3 Lev. 355. *et vide Roll. Rep.* 86. *Style* 38. *Salk.* 507. Pending a suit in equity against him, or after a decree *quod computet*, an executor may pay another of higher or as high a nature; but this must be intended where he hath legal assets; but if he hath equitable assets only, a court of equity will not indemnify him, and suffer him to prejudice and disappoint the first suitor. *Salk.* 507. *Vern.* 369.

If a man brings debt against an executor, and pending this another man brings debt, and the first recovers, he shall be first satisfied. 9 H. 6. 58.

If an action be brought against an executor in another county than where the executor lives, before notice that the action is brought, he may pay the other debts, because it is in another county. 2 H. 4. 21. b. *Plowd.* 279. *Cro. Eliz.* 793. *Leon.* 312. 2 *Leon.* 60.

If an action of debt be abated by an executor in a new action by journeys accounts, he ought to plead fully administered the day of the first writ purchased, (therefore he cannot pay any debt mean between the abatement and the new writ). 48 E. 3. 21. 2 H. 4. 21. *Aldrich and Walthal*, *Cro. Jac.* 579. *Roll. Rep.* 184, 204, 209. *Winch* 82. *Hob.* 248.

Debt for wages by a servant within the statute of labourers, shall be paid before simple contract: 3 D. A. 397. U. p. 1. *Moor* 698. p. 971.

Debts upon simple contracts before legacies.

Debts upon simple contract are to be paid before legacies. *Pinchon's case*, 9 Co. 90. b. *Sid.* 333. *Dodder*

Doctor and Student 78. Debts are to be paid before legacies. 21 E. 4. 21. b. 2 H. 6. 16.

Debts to the king by matter in deed are all one Debt to the king. with debts of a common person, and of them the executor hath the election to pay which he will first. 21 E. 4. 21. If there be a judgment against *A.* on a bond, &c. who dies, and after another obligee of *A.* assigns his bond to the king, the executors of *A.* may pay the judgment, and it will be good against the king, in respect the debt due to the king was not upon record before the death of the testator. *Lane* 65.

An action of debt was brought for 100*l.* received to the king's use; the defendant pleads that the money was paid to his intestate by *Copley* sheriff of *Yorkshire*, for the king's use; but that the intestate dying, letters of administration were granted to the defendant, and that the intestate was indebted to him by bond in 1600*l.* and that he left but 5*l.* assets, which the defendant retains towards satisfaction of his own debt: The attorney general demurred, and judgment was given for the king by the whole court: And it was resolved *una voce*, 1. That the debt to the king by record hath preference in payment before the debt of a subject, for the king's treasure is *vinculum pacis et nervus belli*; and the king being busied in public affairs, the law takes care for him in these cases, that no laches or length of time shall prejudice him. 2. That this prerogative holds in case of debts *in pais*, or upon simple contract, because they stand most in need of this privilege, for other debts will save themselves; and the objection that an executor must take notice of debts upon record, but cannot of debts *in pais*, hath no force; for he must pay bonds before simple contracts, and yet perhaps he can have no notice of the conditions till they be demanded, for the obligees keep them. 3. As this privilege held in the life of the intestate, it continues after his death, and his administrator must

A debt upon simple contract to the king, shall be paid before a debt by bond to a subject.

must pay this debt before other debts to subjects; for, as it extends to the heir for the real estate, so by the same reason to the personal estate; and though this bond be as a judgment, because the administrator cannot sue himself, yet he cannot retain against a debt upon a judgment, or of a superior degree to his own security. 4. That by debt to the king is included damages, trespasses, &c. 5. This privilege is ancient and undoubted, as appears by several writs in the Register, which recites it, and the statutes and book cases speak of the king's debt generally, and there is no reason to restrain it to debts by record, but debts *in pais* are included. *Mercurij 25 January 1681. Scaccario, Dominus Rex v. Burnet.*

Where a bond
not forfeited shall
not bar a legacy.

If a man binds himself in an obligation to perform certain things, and devises several legacies and dies, leaving but sufficient to satisfy the obligation, if it shall come to be forfeited, yet this obligation shall not be any bar of the legacies, because it is uncertain whether the obligation will ever come to be forfeited; but the executor shall make a conditional delivery of the legacies, *viz.* If the obligation be recovered against him, the legatee shall re-deliver the legacy. *Nelson and Sharp, Moor 413. pl. 568. Ow. 72. Style 56. All. 38, 39. Style 37, 54, 73. All. 40, 41.* If the spiritual court goes about to compel payment of a legacy with security to refund, a prohibition lies. *Vern. 93.*

When debts, on
a devise of lands
for payment of
them, shall be
paid in propor-
tion, or according
to superiority.

If lands are devised to trustees for payment of debts, debts by simple contract, and debts by specialty shall be paid in proportion; and though the trustees are creditors to the testator, or sureties for him, yet they shall not be allowed to prefer themselves. *2 Ch. Ca. 54.* All debts, when the devise is to a trustee, shall be paid in average, except those that affect land. *Vern. 63.* But if lands are devised to an executor, they become legal assets, and the debts shall be paid in a course of adminis-

administration, and according to the precedency or superiority at law. *Girling and Lee, Vent. 63. 2 Ch. Rep. 262. Ch. Ca. 248. Roll. Ab. 920. Hob. 265.*

A man devised lands to his nephew, and his heirs, whom he made executor in trust, to sell for payment of debts and legacies: It was held, that the devise being to the nephew and his heirs, shewed that the testator intended it should go in descent, and therefore he should take as trustee, and that the debts and legacies should be paid in average. *2 Vern. 133. Sed vide 2 Vern. 248.* The case of Sir *John Bowles* cited, where upon a trust for payment of debts and legacies, though it was decreed by lord keeper *Bridgman* that they should be paid *pari passu*, and each to bear the loss in average, lord *Finch* reversed the decree, and said he would not let a man sin in his grave. This has since been the constant practice with respect to debts and legacies; but as to creditors they shall be all paid in average, except such whose debts affect the land. *Vide 2 Vern. 405.*

On a devise of lands for payment of debts and legacies, the debts shall be first paid.

Mortgages are not to be preferred to other real incumbrances, but mortgages, judgments, statutes and recognizances, shall take place according to their priority, and as they stand in order of time. *The Earl of Bristol and Hungerford, 2 Vern. 524.*

Real incumbrances to be paid according to their priority.

If creditors have joined in a bill, and obtained a decree for payment of their debts out of the legal and equitable assets, none of them shall be permitted to obtain a preference of the others by obtaining judgment against the executor. *Shepherd and Kent, 2 Vern. 435.*

Where creditors have in equity a decree for payment, they shall not obtain a priority at law.

Where there are legal and also equitable assets, the creditors who will take their satisfaction out of the legal assets, shall have no benefit of the equitable assets, until the other creditors who can only be paid out of those assets, have thereout received an equal proportion of their debts. *Shepherd and Kent, 2 Vern. 435.*

When a creditor follows legal assets, he shall have no benefit of equitable assets.

C c

If

Debt to the king.

If there be a debt due to the king, equity will order it to be paid out of the real estate that the other creditors may have a satisfaction of their debts out of the personal estate. *Vent.* 455.

If a mortgage is paid out of the personal assets, a creditor by simple contract shall stand in the mortgagee's place.

If one dies indebted by mortgage and simple contract, and the executor applies the personal assets in discharge of the mortgage, the simple contract creditor shall stand in the place of the mortgagee; and though one of them gets judgment of assets *quando acciderint*, yet as their relief is only in equity, they shall be paid in average. *Wilson and Fielding*, 2 *Vern.* 763.

Lands devised to the eldest son in tail, and legacies to the other children, the personal estate being applied in payment of bonds, the legatees shall not have their legacies out of the land.

The testator being seised in fee, and indebted by bonds, devised his lands to his eldest son in tail, gave legacies to his other children (whom he had before provided for), and the eldest son being executor applied the personal estate in discharge of the bonds; the legatees brought a bill, praying, that they might stand in the place of the bond creditors, and be paid their legacies out of the real estate. The court seemed to admit, that if the lands had descended, the legatees might have been relieved in this manner; but as the testator had devised the lands, it was held they ought to be exempted; for it was as much the testator's intention that the devisee should have the lands, as that the legatees should have their legacy; and a specific legacy is never broke into to make good a pecuniary one, and the children being otherwise provided for, are not in the nature of creditors. *Hern and Merick*, 2 *Salk.* 416. *Wil. Rep.* 201. *pl.* 46. *Gilb. Chanc.* 307, 310. *Eq. Cas. Abr.* 143, 298. *Bunb.* 137. *Vern.* 31. See *Mosely* 7.

Voluntary judgments and bonds postponed to debts by simple contract.

If a freeman of London gives a voluntary judgment payable three months after his death, it shall be postponed to debts by simple contract, and to the widow's customary share, but will bind the freeman's legatory part. *Fairebeard and Bowers*, 2 *Vern.* 202. A voluntary bond shall not in a course of administration take place of real debts, though

though by simple contract, but shall notwithstanding be paid before legacies. *Jones and Powel.*

A judgment or sentence in *France* for money due, shall be considered here only as a debt by simple contract. 2 *Vern.* 540. Arrears of rent incurred in the testator's life-time, shall be paid before bonds, though the rent was reserved on a lease parol. *Vern.* 490.

A recognizance not inrolled shall only be considered as an obligation, and not as a debt on record. 2 *Vern.* 570. A recognizance was inrolled by special order of the court after the time for the inrolment of it was elapsed; the conusor betwixt the date of the recognizance and the inrolment of it, borrowed money of *J. S.* upon a judgment which was now over-reached by the recognizance, the estate of the conusor being subject to a mortgage prior to the recognizance; so that neither the cognizance nor the judgment could reach the estate without the help of a court of equity; the court inclined to give the preference to the judgment creditor. 2 *Vern.* 234. *et vide* 2 *Vern.* 272. that bond debts, and debts ascertained, shall be preferred to debts that are only founded in damages.

How a recognizance not inrolled shall be considered.

J. S. having entered into a bond wherein he bound himself and his heirs for the payment of 100*l.* six months after his decease, and being indebted to *Neave* in 45*l.* by simple contract, died intestate, not leaving personal assets sufficient to pay his debts, but a real estate of about the value of 100*l.* the son and heir took out letters of administration to him, and conveyed the estate to the obligee; so much money was the consideration mentioned in the deed, but no money was paid, only the bond delivered up. *Neave* demanding his debt, the administrator insisted he had applied the personal assets in discharge of bond, and that he being both heir and admini-

Heir administrator pays a bond out of the real estate, the simple contract debts shall be paid out of the personal estate.

nistrator had a right to pay the bond debt out of which assets he pleased; that he had not paid the bond out of the real estate, nor ever intended so to do. The court declared the bond well paid out of the real assets, and decreed *Neave* his debt and costs out of the personal assets. *Hil. 1695. Neave and Alderton.*

Decree in chancery.

A duty decreed in chancery shall take place next to judgments, and before debts on simple contract and by bonds. *1 Vern. 143.* An administrator paid money on specialties, though without notice of money due by a decree, and had fully administered the assets, yet he was obliged to pay the money decreed. *2 Vern. 37. Vide Roll. Abr. 377. Style 38. 2 Vern. 88.*

C H A P. VIII.

Of an Executor of his own Wrong; How far liable to Creditors and Legatees; Executor de son tort by the Stat. 43 Eliz.

Of an Executor of his own Wrong.

Who is an executor of his own wrong.

AN executor of his own wrong is he who takes upon him the office of an executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution substituted by the ordinary to administer.

It has been doubted whether the only seising and taking into one's hands the goods of the deceased did not make one executor of his own wrong without any further act. *Dyer* 105. b. What acts shall make a man executor of his own wrong.

And. 2. And lord *Dyer* said, that the possession and occupation of, or meddling with the goods, is that which gives notice to the creditors whom they are to sue as executor. If no one takes upon him to be executor, or takes out letters of administration, the using the goods by any one makes him executor of his own wrong. Taking the goods of the deceased. *Read's case*, 5 Co. 33. b. 2 *Leon.* 224. And so it is, if he takes the goods into his own possession, which is the office of an executor or administrator. *Read's case*, 5 Co. 33. b. *Stokes and Porter, And.* 11. *Dyer* 166. b. *Moor* 14. pl. 3. *N. Bendl.* 74. pl. 115. But it is otherwise if administration was before committed. *Far.* 31.

A man may administer several goods of the testator for the expences of his funeral, for this is a matter of charity. May administer goods for the expences of the funeral. 33 H. 6. 31. b. *Dyer* 166 and 167. *Lib. Intr. f.* 322. b. 21 E. 4. 5. *Fitzb. Executors* 24, 38. *Br. Administrator* 36. 21 H. 6. 28. But heed must be taken to the proportion of the expence, and though no particular limits to the expence can be given, yet doubtless either mere necessity, as church duties, &c. or at least decency suitable to the quality of the deceased, must be the bounds; and this must be held within a very narrow compass, for there is no reason, that a man of quality, leaving perhaps intailed lands to a very great value, yet of personal estate not near sufficient to pay his debts, should have three or four hundred pounds (which ought to be applied in paying his debts) spent in a pompous funeral.

Overseers, in seeking to preserve and keep the testator's goods, shall not be charged as executors of their own wrong; but it is otherwise if they expend or dispose of the goods. Overseers.

He who has let-
ters ad colligen-
dum, if he sells,
is an executor by
wrong.

If he, who is authorised by the ordinary *ad colligendum* the goods of the deceased, sell or dispose of any, though they be *bona peritura*, he is an executor by wrong, as it was resolved *Dyer* 255. notwithstanding he was by the ordinary's letter directed so to do; for it was said the ordinary himself could not do it. *Kelw.* 81. 8 *Co.* 135. 9 *Co.* 39. a. 2 *Inst.* 398.

He who admini-
sters by virtue of
a will afterwards
disproved.

He, who administers as executor by virtue of a will afterwards disproved or revoked by another will, shall be liable to the creditors for the goods before administered, either as executor by right or by wrong: A release of a debt by him is void. *Greves and Weigham, Roll. Ab.* 919. *D. p.* 2.

He who takes
wrongfully from
the rightful exe-
cutor, is a tres-
passer, and not an
executor de son
tort.

If there be a rightful executor, and a will by him proved, or administration committed, and one takes goods wrongfully from such rightful executor or administrator, this, though he convert them to his own use, makes him not an executor by wrong; but a trespasser to the rightful executor or administrator, who even for those goods once assets in his hands stands liable to the creditors, they being neither lawfully evicted nor rightly administered; but in case there had been no executor at that time, nor no will proved, nor administration committed, then such taking of the deceased's goods had been an executorship by wrong.

Unless he receives
and pays, claim-
ing to be execu-
tor.

Read and Carter, 5 Co. 33. b. 34. a. But tho' there be an executor or administrator by right, yet if a stranger takes upon him to receive debts and make acquittances, or to pay debts or legacies, claiming to be an executor, he is suable as an executor by this act. *Read and Carter, 5 Co.* 34. b.

How if the goods
never came to the
executor's hands.

Dyer 166. b. *N. Bendi.* 12. But where the goods so taken never came actually to the executor's hands, but were in a remote place, there this taker becomes executor; for it would be mischievous if the executor should by a possession in law cast upon him, stand chargeable with those goods, in remote places purloined, as assets in his hands; so
it

it would be mischievous to creditors, if neither executor by right, nor this stranger as executor by wrong, should stand liable to the creditors for them.

If a woman after the death of her husband ^{Wife's apparel.} takes more of her apparel than is convenient, she shall be executrix of her own wrong. 33 H. 6. 31. *Dyer* 166. 11 *Fitzh. Executors* 24. *Bro. Executors* 19. 21 H. 6. 28.

If an executrix makes a fraudulent gift of all her testator's goods, and yet continues the possession thereof, and marries and dies, and the husband being possessed of part thereof, pays legacies, he is chargeable as an executor *de son tort*. ^{Taking goods by means of a fraudulent gift, makes an executor by wrong.} *Wilcox and Watson, Cro. Eliz.* 405. The taking the goods of the intestate by virtue of a void or fraudulent gift, made in his life-time, will make one an executor of his own wrong. *Stamford's case, Leon.* 223. *Dal.* 94. *Bethel and Stanhope, Cro. Eliz.* 810. 2 *And.* 172. *Ow.* 132. *Haws and Loder, Yel.* 197. *Cro. Jac.* 271. *Brownl.* 111, 112. *Moor* 396. pl. 518. *Gouls.* 116.

If lessee for years *in reversion* dies intestate, and his wife assigns the term, and after takes out ^{Executor de son tort of a term.} administration and assigns to another, the first assignment is void; for upon such term no entry could be made, nor could there be any executor *de son tort* thereof. *Kenrick and Burges, Moor* 26. pl. 273. But where such a termor dies intestate, and one enters and possesses himself thereof, he thereby becomes executor *de son tort*. *Parker and Sweetman, Style* 406, 432. 2 *Mod.* 232, 175. If lessee for years dies intestate, and one enters, he thereby becomes executor *de son tort*, and if he commits waste, the lessor may have an action of waste against him. *Mayor and Commonalty of Norwich against Johnson, 3 Lev.* 35. 3 *Mod.* 90. *Comb.* 7, 8.

How far an Executor de son tort is liable.

Liable to the
rightful executor
and creditors.

AN executor of his own wrong is not only liable to an action at the suit of the executor, who hath right to the goods wrongfully meddled with, but also to an action at the suit of a creditor, who hath right to a satisfaction for his debt, but he shall only be charged so far as the value of the goods wrongfully administered by him amount unto.

To Legatees.

An executor of his own wrong shall be bound to pay legacies, as well as an executor of right: *Philpot's case*, 3 D. A. 375. p. 1. 3 Leon. 28. Noy 13.

Their executors
and administrators
liable.

The executors and administrators of any person or persons, who as executor or executors in his or their own wrong, or administrators, shall waste or convert any goods, chattels, estate or assets of any person deceased to their own use, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. Stat. 30 Car. 2. c. 7. made perpetual by 4 & 5 W. & M. c. 24.

*Of Executors by wrong by the Stat. 43 Eliz.
c. 8.*

By obtaining
goods, &c. by
procuring by
fraud administra-
tion to be grant-
ed to a stranger
of mean estate,
without valuable
consideration, shall
charge one as ex-
ecutor de son
tort.

THIS statute reciting, that it had been practised in order to defraud creditors, that such persons, as were to have the administration of the goods of others dying intestate committed to them, if they had required it, would not accept the same, but suffered or procured the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means, do take deeds of gift, and

and authorities by letters of attorney, whereby they obtain the estate of the intestate into their hands, and yet are not subject to pay any debts owing by the intestate, and so the creditors for want of knowledge of the place of habitation of the administrator cannot sue him; and if they find him out, for want of ability in him to satisfy of his own goods the value of what he hath conveyed away of the intestate's goods, or released of his debts by way of waiving, the creditors cannot recover their just debts: It is therefore enacted, that every person that shall obtain, receive and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts (except it be in or towards satisfaction of some just and principal debt of the value of the same goods, or debts to him owing by the intestate at the time of his decease) shall be chargeable as executor of his own wrong. And so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance of all just and principal debts upon consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him, which lawful executors or administrators may and ought to have and pay,

How far.

Allowance of debts, &c. owing to himself.

C H A P. IX.

Of Administrators; In what Cases Administration shall be granted; How upon the Stat. 31 E. 3. Upon the Death of what Person; By whom to be granted; Upon the Stat. 21 H. 8. and to whom to be granted.

Of Administrators.

He hath the office of an executor.

EVERY executor is an administrator of the goods, and the pleading is *ne unques executor*, nor ever administered as executor; and the administrator hath the office of an executor. 5 Co. 83. a. Vide 2 Roll's Abr. 399. A. 1.

In what Cases Administration shall be granted.

If the executor refuses, Administration may be granted.

IF all the executors refuse to administer, administration shall be granted. 21 Edw. 4. 24. 20 H. 6. 1. b. 36. 38 H. 6. 8. for now the executor is dead intestate. 19 E. 3. *Covenant* 24. 50 E. 3. 9. But it is otherwise if one refuses, and another proves the will. *Hensloe's case*, 9 Co. 37. In such case no administration can be granted till all be dead, or have refused. *Hard.* 111.

But not till refusal.

But if a man make an executor, the ordinary cannot grant administration before refusal of the executor. 3 H. 4. *Administat.* 22. Not if upon a citation to prove the will he does not appear. *Leen.* 90.

If

If an executor hath administered, he cannot afterwards refuse, because he hath accepted of the executorship, and so determined his election; at least the ordinary ought not to accept of such refusal, but should compel him to take upon him the executorship; but if the ordinary admits one to refuse notwithstanding he hath administered, it stands good. 36 H. 6. 7, 8. *Factum valet quod fieri non debuit.* After refusal and administration committed, the executor cannot go back to prove the will and assume the executorship; but if only upon the executor's making default to come in upon the process to prove the will, administration be committed, the executor may at any time after come and prove the will, and so undo the administration. *Mich. 27, 28 Eliz. Bale and Baxter, Leon. 90. Vide 3 H. 7. 14. Mod. 214. 2 Brownl. 58. Rol. Ab. 917. B. 1, 2, 3.*

Cannot refuse after they have administered.

If a man makes an executor, and it is not known or concealed, the ordinary may grant administration, and it shall be good till the other proves the will. 7 E. 4. 12. b. 13. *sed vide Slingsby and Lambert, Cro. Jac. 294. 3 Bulst. 112. Rol. Rep. 276. Godb. 262. 2 And. 150. 151. 2 Jon. 72. Plowd. 277.*

If Executor not known, or there be no knowledge of a will.

If the ordinary knowing nothing of a will grants administration, and the executor afterwards renounces, this will not make the administration before granted good, or the sale of a lease made by such administrator good; but after such renunciation, the administration being repealed, a new one may be granted. *Abram and Cunningham, 2 Jones 72. 2 Mod. 146, 147. Vent. 303, 304. 2 Lev. 182. 3 Keb. 725. et vide Shower 406, 407.*

If B. dies intestate, and administration is granted to C. who afterwards dies also intestate, and administration of his goods is granted to D. D. is no administrator or representative of B. the first intestate; but in such case administration of the goods

When an administrator dies, administration de bonis non must be granted.

goods of *B.* unadministered by *C.* must be granted.
Goslyn and *Osborn*, 1 *Roll. Ab.* 907. *C.* p. 5. 34
H. 6. 14. *Dyer* 47. 26 *H.* 8. 7. 28 *H.* 8. 32
H. 8. *Brudnel's* case 5 *Co.* 9.

So when the executor dies intestate.

If an executor dies intestate, administration ought to be granted of the testator, for now he is dead intestate. 21 *E.* 4. 24. 26 *H.* 6. 7. *Hard.* 473. vide 10 *E.* 4. 1. 3 *D.* *A.* 309. p. 5.

If the executor dies before probate, administration with the will annexed must be granted.

If an executor before probate, of the will of his testator, makes an executor and dies, the executor of the executor shall not assume upon himself the execution of the first will; but administration of the goods of the first testator with the will annexed shall be granted. *Dyer* 272. *b.* said by the judges of the prerogative court to be the usage and custom of their court, and agreeable to the law, by the opinion of *Dyer*, to which the court gave credit. *Vide Hayton and Wolfe*, *Gro. Jac.* 694. *Palm.* 153, 154. Because he cannot prove this will of the first testator, and therefore incapable of recovering his debts, and consequently of being his executor. *Salk.* 308.

How Administration ought to be granted upon the Statute 31 Edw. 3. c. 11.

To whom administration shall be granted.

BY the statute 31 *E.* 3. c. 11. where one dies intestate, the ordinary shall depute the next and most lawful friends of the intestate to administer, which deputies shall demand and recover as executors the debts due to the intestate, to administer and dispend for his soul, and shall answer also to whom the intestate was holden or bound, as executors shall answer, and they shall be accountable to the ordinary as in case of a testament.

Inconveniences before this statute.

The inconvenience before this statute, was that although the ordinary might have seised the debts of the intestate, yet neither he, nor any under him, could

could sue for his debts in the king's courts; so that the debtors would defraud the wife and children, and creditors lose their debts. *Cart. 132.*

Show. 407.

This statute has made six alterations, three as to the ordinary, and three as to the administrators; as to the ordinary, 1. Before the statute the ordinary was not compellable to grant administration, but now by the act he is commanded, and thereby compellable to grant administration; and a refusal to do it is a contempt to the king, and an injury to the party. [An action lies for such refusal, *Cart. 125.*] 2. The ordinaries are restrained

The ordinary compellable to grant administration.

from granting administration to whom they please; for now the administrator by this act has a more absolute interest in the goods of the intestate than the ordinary had, and ability to recover the debts and other things in action due to the testator, whereas to the ordinary himself no remedy is given; and therefore the ordinary is bound by the act to grant administration to the next and most lawful friends, (*i. e.* the next of blood which are not attainted of treason, felony, or have other lawful disability); but the Stat. 21 H. 8. c. 5.

To whom he must grant administration.

gives power to the ordinary to grant administration to the wife of the intestate, or to the next of blood, or to both; and so as to the wife has altered the said statute of the 31 E. 3. [The administration to the wife deceased of right ought to be granted to her husband as her most faithful friend within this statute. *Jones and Rowe, Jon. 175. Cro. Car. 106. Moor 871. pl. 1210. Palm. 521. Sid. 409. 1 Mod. 231. Show. 351. Salk. 36. 2 Mod. 20.* Who shall be said next friends within the Statute, *Vide Raym. 498.*] 3. The ordinary has no greater interest in the goods by this act,

To the wife, or next of kin, or both.

but has greater power than he had before in this only, that he may constitute administrators who shall have by this act greater interest and ability than they had before the act; and where the statute

To the husband.

says, that in case a man dies intestate we must note, that a man may die intestate in fact and in law; in fact, when he makes no testament; in law, when he makes a testament, and the executors refuse before the ordinary, or they all die intestate; and the act 31 Ed. 3. extends to both intestacies. *Plowd.* 179. 18 H. 6. 23. And the reason why the ordinary in such case may, upon the refusal of all, or death of all intestate, grant administration, is for that now the testator is dead intestate; and then the act gives him power to grant according to the act, which the ordinary cannot do when one refuses, and the other proves. As to the administrators, 1. They have now as absolute property in the goods and chattels as executors have, which they had not before this act. 2. They shall recover the debts (and by equity shall have an action of covenant, actions upon case, and all other actions which executors may have) which they could not do at the common law. 3. They shall answer to actions, &c. in the same manner as executors; and in this point also the common law is altered; for at common law they were charged by the name of executors, and now they shall be charged by the name of administrators; and yet it was doubted after the making the said act, by what name they should be sued. 38 E. 3. 26. 41 E. 3. 2. So this administrator constituted by the ordinary, (whom the law puts *in loco parentis*) so advanced, enabled, empowered, and in all points made equal to an executor constituted by the party himself, is newly created by this statute, and no such administrator was at the common law; and for that the ordinary was constituted *in loco parentis*, to see that the debts and duties of the intestate should be paid, and to grant administration according to the said act for the benefit of the children or other next of kin; but for that it would be a great trouble to the ordinary himself to take such charge in such multitude of cases within his

Administrators
have absolute
property in the
goods.

May recover
debts.

Shall answer
actions.

diocese, the said act of 31 E. 3. made for his ease, has endued his deputies with greater power than he himself had, to the intent that the administrator may, as much as he can, perform the trust committed to him; and for this cause the said act has also provided, that administrators to the same intents and purposes shall be accountable as executors have been. *Hensloe's case*, 9 Co. 39. b. 40.

The ordinary may compel the administrator to account, but not to distribute. *Noy* 24, 28, 78. *Car.* 12. *James and James*, *Rol. Rep.* 123. 2 *Bulst.* 315. Ordinary may compel an administrator to account, but not to distribute.

No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor or next of kin; nor shall be compellable to account before any ordinary or judge empowered by the act 22, 23 Car. 2. c. 10. otherwise than as aforesaid. *Stat.* 1 Jac. 2. c. 17. sect. 6. But 1 *Salk.* 316. it is said the statute had no effect, the law being so before, that the ordinary, *ex officio*, could not cite him. At whose suit he may be cited to account.

An executor was compellable to account before the ordinary, and so was an administrator, but the ordinary, was to take the account as given in, and could not oblige them to prove the *Items* of it, nor swear the truth of them. *Salk.* 315. *Per Holt.* *Noy* 78. So if a creditor had sued in the spiritual court, for he had a remedy at law; but if a legatee had sued for an account, the defendant must have proved his account, for the legatee had no remedy but in the ecclesiastical court; yet in such case, if the executor would pay him, he could sue no further. 1 *Salk.* 31. So a person intitled to distribution, under the statute 22, 23 Car. 2. being a statute legatee, may have the same remedy, and oblige an administrator to prove his account. *Salk.* 251, 316. Of obliging him to prove his account.

The ordinary may grant several administrations of several parts of the goods of the intestate. 10 E. Ordinary may grant several administrations.

4. 1. b. 18. H. 6. 12. b. 38 E. 3. 21. *Hell.* 135. But if there be a bond for 100*l.* Administration cannot be granted as to 50*l.* Part thereof to one, and as to the other 50*l.* to another. *Sid.* 100. *Salk.* 36.

May grant it
upon condition.

The ordinary may grant administration upon condition; as where before it was granted to J. S. who is now outlawed, and in prison beyond the seas, it may be granted to another, *ita tamen*, that if the said J. S. returns into England, he shall administer. 34 H. 6. 14.

May grant ad-
ministration
durante absentia
executoris beyond
sea.

If an executor be beyond the seas, an administration may be granted during his absence; for it is as reasonable in this case as *durante minori etate* or *pendente lite*, and such administrator is as accountable to the executor. *Slaughter* and *May*, *Salk.* 42. 6 *Mod.* 304. And in an action brought by such administrator it was intended that the absence was beyond sea, but then there ought to have been an averment that he was absent. *Vide Hodges* and *Clare*, 4 *Mod.* 14. adjudged; though being cited in 6 *Mod.* 304. it is there denied to be law; but as cited *Lutw.* 342. it was said to have been adjudged, that such administration was grantable, and a great conveniency thereby; for otherwise, if the next of kin was beyond sea, the debts of the intestate could not be collected or recovered: And it was also held by the court, that after the return of such next of kin, payment to the administrator before notice, is good; such an administrator is liable to be sued, for he is fully an administrator for the time. Where there is a controversy in the spiritual court concerning the right of administration, an administration granted *pendente lite*, is good; but otherwise when the controversy is concerning a will. *Carth.* 153. *Moor* 636. *pl.* 174. 3 *Keb.* 54. *Fitzgib.* 202. Where executors are made from a time to come, administration may be granted in the mean time. *Dal.* 85.

Administration
pendente lite,
when good.

If administration be granted and entered in the registry, though the letters of administration be not

not made out, it is sufficient. *Show.* 408. *et vide*
Dyer 294. p. 7.

Upon the death of what Person.

IF a feme covert dies intestate, administration may be granted of her goods, for peradventure she had things in action which are not given to her husband by the law. *D.* 8 *Eliz.* 251. 90. *Roll's Abr.* 908. E.

Upon the death
of a feme covert.

By whom Administration shall be granted.

IF he, who dies intestate, hath goods in several counties, the metropolitan shall grant administration. 14 *H.* 6. 21. 10 *H.* 7. 18. 35 *H.* 6. 43. If he hath *Bona Notabilia* to the value of 100*s.* in several dioceses, the metropolitan shall grant administration. 10 *H.* 7. 16. *b.* If a man leaves *bona notabilia* in several dioceses of the same province, there must be a prerogative administration. *Salk.* 39.

By the metro-
politan, if bona
notabilia in several
dioceses in the
same province.

If a man who dies intestate, leaves goods in one diocese in one province, and goods in another diocese in another province, each bishop must grant an administration. *Salk.* 39. *sed vide Cro. Eliz.* in *Byron's case* 472. & *Noy* 54.

If in one diocese
in one province,
and in another
diocese in another
province, each
bishop shall grant
administration.

If one leaves *bona notabilia* in two dioceses in the province of *Canterbury*, and two in the province of *York*, there must be two prerogative administrations. *Salk.* 39.

If in two dioceses
in each province
two prerogative
administrations.

If a man dies intestate beyond the seas, the archbishop shall grant administration. *P.* 11 *Jac. B.* per *Coke* to be adjudged. 42 *Eliz. Rol.* Ab. 908. *F.* p. 3.

How upon intestate's dying beyond sea.

The probate of every bishop's testament, or the granting administration of his goods, though

How if a bishop
dies intestate.

he hath nothing but within his own jurisdiction, belongs to the archbishop. 4 *Inst.* 335.

How if bona
notabilia in Ire-
land and
England.

If a man hath *bona notabilia* in *Ireland* and *England*, and dies intestate, there shall be several administrations granted, viz. by the archbishop of *Dublin*, for all within his province, and by the archbishop of *Canterbury*, for all within his province; (but this seems to be intended, that he had *bona notabilia* in divers dioceses within each province, or goods in his diocese; for otherwise it seems it ought to be granted by the ordinary where the goods are, and not by the metropolitan). *Dy.* 14 *Eliz.* 305. 76, 77. 3 *Keb.* 163. 2 *Lev.* 86. So it is if in the provinces of *Canterbury* and *York*. 2 *Lev.* 86. An administration in one province is void as to the other, because they are distinct supreme jurisdictions. *Hard.* 216. *Salk.* 39.

If in York and
Canterbury.

When by dean
and chapter, or
commissioners-
delegate.

In the time of the vacation of the archbishop or of a bishop, the dean and chapter shall grant administration. 36 *H.* 8. *Brook Admin.* 276, per omnes legis peritos; and by those of the arches. *Roll. Ab.* 908. *G. p.* 2. Whether by commissioners delegate in any, and what case. *Latch* 85, 86.

If a man dies in
itinere.

It is ordained by a canon, 1 *Jac.* 92. that if any man dies *in itinere*, the goods which he hath about him at the time, shall not cause his testament or administration to be liable to the prerogative court.

If obligee dies
intestate, ad-
ministration may
be granted where
the obligation
was at his death.

If a man becomes bound in an obligation in *London*, and dies intestate at *Devon*, and there had the obligation at the time of his death, administration ought to be granted by the bishop of *Exon*, where the obligation was at the time of his death, and not by the bishop of *London* where the obligation was made; for the debt shall be accounted goods as to the granting administration where the deed was at the time of his death, and not where the deed was made. *Lun* and *Dodson*, *Roll's* *Ab.*

Ab. 908. *G. p.* 4. 909. *vide antea* the case of *Byron and Byron.*

An administrator made by a bishop in *Ireland*, cannot bring an action here as administrator. *Carter and Crofts, Godb.* 33. An administrator made in *Ireland* cannot sue here.

The bishop of *Cork* in *Ireland*, being in *London*, may commit administration of things within his diocese in *Ireland.* *Carter and Crofts, Godb.* 33. The bishop's power of granting administration of goods in his own diocese, follows his person where-ever he is. It is an authority or power which follows his person, and where-ever his person is, there is his authority. *6 Mod.* 145. This power of granting administration, making deans, &c. in his own diocese, follows the person of the bishop, though his other jurisdiction is local. *Knollys and Robbins, Godb.* 342. *Palm.* 368. *6 Mod.* 145. So the bishop of *London*, being at *London*, may commit administration, but it must be of things within his diocese. *Godb.* 33. So the archbishop of *Canterbury*, being at *York*, may, &c. *Lutw.* 535.

What shall be *bona notabilia*, and of what value, *Bona Notabilia, vide antea.*

Administration upon the Stat. 21 *H. 8. c. 5.*
and to whom administration is to be granted,
vide antea fo. 397. 31 *E. 3. &c.*

BY the Stat. 21 *H. 8. c. 5.* administration shall be granted to the widow of the intestate, or to his next of kin, or both, at the discretion of the ordinary, taking sureties of him or them for the true administration of the goods, chattels and debts, and where several claim the administration as next of kin, being in equal degree, the ordinary may accept one or more making request, where divers require the administration. To whom by the Stat. 21 *H. 8. c.*

A man died intestate, and the ordinary granted administration to a stranger, and afterwards the next of kin to the intestate sued out a citation in Administration granted, his acts pending a citation to repeal it good.

the ecclesiastical court to have it repealed; pending the appeal, the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sold the goods of the intestate to the defendant, and afterwards the letters of administration are revoked by sentence, and the first sentence annulled and made void, and the administration was committed to the plaintiff: It was held that the sale was good, for the first administration was legal until it was countermanded; and a diversity was taken between the suit by citation, which is to countermand or revoke the former letters of administration, and an appeal which is always to reverse a former sentence, for an appeal *suspends* the former sentence, which a citation does not. *Packman's case*, 6 Co. 18. b. *Cro. Eliz.*

459. *Moor* 369. *sed vide Brownl.* 51.

Administrator hath an absolute property, and the ordinary cannot repeal at his pleasure, or compel distribution.

When administration is granted, the absolute interest in the goods of the intestate is vested in the administrator, and the ordinary hath nothing more to do, and he cannot now, as formerly, repeal the administration at his pleasure. *Levanne's case*, *Cro. Car.* 201. 1 *Jon.* 228. *Slawny's case*, *Hob.* 83. *Moor* 864. pl. 1191. *Hugh's Case*, *Cart.* 125. He cannot compel a distribution. *Winch* 11. *Noy* 24. *Brownl.* 32. *Hethl.* 134. *Cro. Car.* 62. *All.* 56. *Palm.* 517. *March* 13, 93. *Raym.* 499. *Lev.* 233. *Cart.* 125. *Litt.* 21, 37. *Style* 102, 439, 456.

Cannot repeal letters of administration duly granted, without cause.

An administration being well granted according to the statute, cannot be repealed without cause, as lunacy. *Vide Price and Parker*, *Lev.* 157. *Sid.* 280. 8. *Offley and Beets*, *Lev.* 186. *Sid.* 293, 370, 371. 2 *Keb.* 63. *Cro. Eliz.* 163. *All.* 36. 2 *Brownl.* 119. *Style* 10. *Latch* 68. *Skinner* 155, 156. 2 *Show.* 486. 3 *Mod.* 23, 24, 90. But may for just cause; as if after granted the administrator becomes a lunatic. *Sid.* 372, 373. So he may where it is granted irregularly, or *inverso Ordine*. 1 *Lev.* 305. So if granted

to the husband and wife, when it should have been granted to the wife only. *Brown and Wood, All. 36. Style 74.* So if granted by fraud or surprise. *Fitzg. 303, 304.*

By preferring the wife and children to the administration, the statute imitates the mind of the intestate, to prefer those whom it is likely he would have preferred if he had made a testament, by giving them all the profit, and not the labour only in getting in the effects, &c. *Hob. 83.*

Administration may be granted either to the widow, or to the next of kin, at the election of the ordinary. *Fortree and Fortree, Show. 351. Salk. 36. Comb. 289. 2 Vern. 125.* Or part to the one, and part to the other. *Salk. 36.* But after it is granted to one, the ordinary cannot revoke it, and grant it to another. *Sands's case, Sid. 179. Raym. 93.*

Of grant'ng it to the widow or next of kin.

An executor died before probate, his executor is not executor to the first testator; but if the goods after debts and legacies paid were bequeathed to his testator, the administration shall be committed to him with the testament annexed; and if they were not bequeathed to him, the administration shall be committed to him to whom they were bequeathed, and for default of one such, to the next of kin to the first testator, who demands it. *Istede v. Stanley, Dyer 372. p. 8. John Denne* made his will, and thereby devised several legacies, and to his wife the residue of all his moveable goods and chattels, and made his wife executrix and died, having several debts due to him upon bond. The wife died before probate, and administration of the goods of *John Denne* with the will annexed was granted to the sister of the wife, and thereupon *Thomas Denne* brother of the said *John Denne* appealed to the delegates; whereupon the administration was revoked, and a new administration committed to *Thomas Denne* with the will annexed;

Where to the next of kin of the residuary legatee, and not of the intestate.

and the reason was, for that by the devise of all his moveable goods and chattels, debts which are rights were not devised; so that there being something which was not devised, the administration shall be granted to the next friends of *John Denne*; but if all the goods, chattels and debts had been devised, and no residue, then the administration appertains to the legatee, for he had the whole estate. *Sparke and Denne, Jones 225. vide 2 Rol. Rep. 159. Sid. 281. Thomson and Butler. 2 Lev. 55. Vent. 217, 218. 3 Keb. 23. Fitzgib. 206, 207. T. Raym. 496.*

Or of one intit-
tled to the sur-
plus under the
stat. of distri-
butions.

The next of kin to one who dies intituled to the whole surplus of the personal estate of another, under the statute of 21, 23 *Car. 2.* shall have the administration. *Skinner 213, 222.*

The father shall
have administra-
tion to the son.

Administration may be granted of the goods of the son or daughter to the father or mother as next of blood. *3 Co. 40. 2 Show. 307.*

The grandfather
before the uncle.

If one dies intestate, leaving a grandmother, and uncles and aunts, the grandmother is intituled to the administration in exclusion of the uncles and aunts. *Woodroof and Winkworth, Prec. Ch. 527. Salk. 38, 251.*

The son before
the grandfather.

If there be grandfather, father and son, and the father dies intestate, the son shall have administration, and not the grandfather. *Vide 2 Vern. 125.*

Two in equal de-
gree.

If two be in equal degree, administration may be granted to either of them. *Style 451.*

Where if repea-
led it must be
granted to the
same person
again.

If administration be granted to one, and after repealed *quia improvide, &c. viz.* within fourteen, it must be granted to the same person again. *Sid. 293.*

Half blood,

The half blood is esteemed as near as the whole. *Brown and Wood, All. 36. Style 74. Cases in Parl. 108.*

How if the next
of kin be incapa-
ble.

If the next of kin be incapable, as if he be attainted or excommunicated, the administration may be granted to another; and after the impediment

ment is removed, it may be repealed and granted to him. *Sid.* 373.

When administration is not to be granted to one under age, *vide Salk.* 39. 2 *Jon.* 48. *Skin.* 156. Where it may be to an alien amy, 2 *D. A.* 322.

p. 9. Where one in execution had a right to administer to the plaintiff, and doing so, could not be discharged, but ought to renounce, and another take administration who might discharge him. 2 *Mod.* 315. The bishop may grant administration to whom he pleases, if he will forfeit the penalty (*viz.* 10*l.*) limited by the act. *Leon.* 240. *sed vide* 9 *Co.* 39. b.

If a feme covert dies intestate, administration of her goods of right belongs to her husband. *Oguel's Case*, 4 *Co.* 51. It may be granted to a stranger though the husband be living. *D. 8 Eliz.* 251.

9. *Rel. Ab.* 910. *K. p.* 2.

Administration *durante minori etate* of an executor, is not within the statute of 21 *H.* 8. to be granted of necessity to the widow or next of kin, because there is an executor all the while. *Briers* and *Goodard*, *Hob.* 250. *Brownl.* 31. And said, that therefore it might be revoked and granted to another. *Et vide* 3 *Mod.* 23, 24. *Fitzgib.* 163, 164. but perhaps it would be otherwise if an executor was to be made from a day to come.

Hob. 250.

If a feme covert as next of kin hath a right to administer, the administration ought not to be granted to the husband and wife; for then if she should die before him, he would continue administrator against the meaning of the act. *Brown* and *Wood*, *Allen* 36. *Styie* 74, 75. But it was said, that if it had been granted to them only during the coverture, perhaps it might be good; because if granted to the wife only, the husband might, during the coverture, have administered. *All.* 36. If the wife, as a residuary legatee, hath a right to take administration, but refuses, and prays it

may be granted to another, and not to her husband, yet it may be granted to her husband, *Vanthienam's case*, *Fitzgib.* 203.

Not grantable to an infant.

Administrations are by the statute, and not grantable to any under twenty-one, who must give bond, *Ec. Salk.* 39. *sed vide 2 Jones* 48. *et postea* the case of *Jayner and Watts*.

Administration to two does not cease on the death of one.

If administration be granted to two, and one of them dies, yet the administration does not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceases; but it is rather an office, and the administrators are enabled to bring actions in their own names, and come in the place of executors, and therefore the office survives. *Adams and Buckland*, 2 *Vern.* 514.

In the case of a will, a *Mandamus* to doctor *Bettesworth*, as judge of the prerogative court of *Canterbury*, to grant probate of the earl of *London-derry's* will, to the executors therein named. The doctor returned, that it is the custom and practice of the prerogative court, that if any creditor of the deceased enters a caveat against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge hath not used nor ought to grant any probate: Then he sets out, that two creditors, who swore to their debts, entered a caveat, and prayed a commission of appraisement; which was decreed and issued, but is not yet returnable; and for that cause he cannot as yet grant a probate. Upon argument, the court held the return to be ill; for that the judge can only stay the probate, where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor for getting in the effects of the testator. And by the 21 *H. 8. c. 5.* the probate is to be granted *with convenient speed without any frustratory delay*; and the ecclesiastical court shall never be suffered to set up their practice against the law of the land. And a peremptory *mandamus*

mandamus was granted. *K. and Bettefworth, Stra.* 857. 2 *Kel.* 139. pl. 118. *Barnard. K.* B. 280. *Andr.* 1365. *Fitzgib.* 125. 2 *Burn's Eccle. Law* 632.

It was moved for a *mandamus* to doctor *Bettefworth*, commanding him to grant administration to *Smith* of the goods of his deceased son, during the minority of his grandson. Against this it was insisted, that the father hath not an equal right with the son, and that the spiritual court hath always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family. Where there are several in equal degree, as children, they have always chosen which they pleased. And by the court, When we grant a *Mandamus*, it is to oblige the judge to do right to the party who sues the writ, but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. In the case of the next of him, he is intitled *de jure*, and therefore in this case we grant a *mandamus* of course. We will grant no *mandamus* in this case. *Smith's Case, Stra.* 892. *Barnard. K.* B. 370, 425. *Andr.* 24, 366. 3 *Bac. Abr.* 535. 2 *Burn's Eccle. Law* 633.

John Kynaston, Esq; made his will and two persons executors, and left the residue of his personal estate to his youngest son *Edward*. The executors renounced; and the residuary legatee moved for a *mandamus* to be admitted to prove the will, and have administration with the will annexed. And a rule was made to shew cause. On shewing, it was insisted, that this case differed from lord *Londonderry's*, where the commission of appraisement was set up against the immediate grant of the probate, which the statute of the 21 *H. 8. c. 5.* requires shall be without any frustratory delay; and the ordinary hath no election there: Whereas in the present case, he is not bound to grant the administration to
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the legatee, none of the statutes mentioning him; on the contrary; the statute of the 21 *H. 8. c. 5.* which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court; who said, if the commission of appraisement was a grievance, it would be proper matter of appeal, but they could not break into the practice of the court below. And lord *Hardwicke* mentioned a case in *Chancery* before lord *Macclesfield*, between *Wheeler* and the archbishop of *Canterbury*, where it was held, that these sort of administrations are not within the statute of distribution; which brings it to *Smith's* case, where a *mandamus* to grant administration during the minority of an executor, to the father of the executor was refused, because there was no law obliging the spiritual court so to do. And the rule for a *mandamus* was discharged. *K. and Bettesworth, Stra. 956. 2 Barnard. K. B. 334. 2 Kel. 139. pl. 118. 3 Bac. Abr. 535. 2 Burn's Eccle. Law 633.*

Mandamus, to grant administration to *John Callom*, of *Joan* his wife. Return; that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who hath duly proved the same. To this return it was objected, that she might have things in action not covered by the deed, and the husband was in all events intitled to an administration as to them; which was agreed to by the court; and a peremptory *mandamus* was granted. *K. and Bettesworth, Stra. 891. 2 Burn's Eccle. Law 633.*

Mandamus to grant administration to *Mr. Bridgen*, husband of the late lady *Bellamont* deceased. The dean of the arches returned, that a suit had been commenced before him, between *Mr. Bridgen* and a son of the deceased, who claimed to be her executor under a will made by her pursuant to a deed executed before marriage; whereby the husband agreed

agreed she should have power to make a will and dispose of her estate; which deed Mr. Bridgen had confessed, and thereupon sentence had been given for the validity of the disposition; but not for any executorship created thereby; and thereupon a new suit was instituted by the daughter against the son and Mr. Bridgen, for administration with the will annexed; which is still depending. And upon consideration the court declared, that no peremptory *mandamus* ought to go: For tho' generally the husband is intitled to the administration as next of kin; yet that is in respect of the interest he has in the estate, and because no body is in equal degree: And that is the reason, why administrations are so often granted to a residuary legatee: And though strictly speaking this is no will, but rather an appointment which is to operate in equity; yet the true question is, whether this is such an intestacy, as is within the meaning of the statute. And the law, particularly the 29. Car. 2. c. 3. considers *femes covert*s as having some right to dispose of their effects, which can only be by the agreement of the husband, which appears in this case; and this differs greatly from the case of *Cullom*, where the power was only as to a leasehold estate, whereas she might have other effects. The matter is properly under the consideration of the spiritual court, to whom to grant the administration, and there is no reason for us to interpose; and therefore the return must be allowed: *K. and Bettesworth, Stra. 111. Andr. 365. 2 Barnard. K. B. 420. 2 Burn's Eccle. Law 634.*

If a *Bastard* dies intestate, without wife or issue, leaving a personal estate; in such case the king shall be intitled, and the ordinary shall grant administration to the king's patentee. *3 P. Wil. 33. 2 Burn's Eccle. Law 635.*

Notwithstanding the statute of *H. 8.* administrations have been granted to the principal creditor from the next of kin, by the opinion of both civil

civil and common lawyers; where it is visible that the next of kin cannot have any advantage or benefit of the estate; and this hath been always taken to be out of the statute. *Per* chancellor King, *4 Vin. Abr. 87. pl. 24.*

But this, as it seemeth, should be understood only in case where the kindred refuse to accept the administration. And the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor. And in case there are several creditors; the court generally obliges them to enter into articles and bond of average. And such creditor must make an affidavit of his debt, and therein set forth how much it is, and how due. *2 Burn's Eccle. Law 637.*

Walker Weldon died intestate, leaving *Anne* his wife, and *Amphill* his sister. The sister, upon the common oath, that she believed he died intestate without wife or children, obtained administration. And in a suit to repeal it as obtained by surprise, it appeared to be the course of the court, never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had the opportunity to make the election which the statute of the 21 H. 8. c. 5. gives him; that it was incident to every court to rectify mistakes they were led into by the misrepresentation of the parties; that if there was no surprize (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: But here was a plain surprize, and therefore they denied a prohibition. *Harrison and Weldon, Stra. 911. 2 Burn's Eccle. Law 643.*

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The plaintiff declares on bond in the *detinet*, against the defendant as administrator during minority, with the will annexed. And upon *oyer*, the condition appears to be, for exhibiting an inventory and duly administering by paying debts and legacies. The performance of all which the defendant avers. The plaintiff replies, that he had not paid a legacy of 1500*l.* though he had more than sufficient to pay all the debts, to wit, 500*l.* and on demurrer it was objected, that this was a void bond, not warranted by the statute of the 21 *H. 8. c. 5.* (nor by the statute of 22 & 23 *Car. 2. c. 10.* for neither of those statutes extendeth to administrators during the minority of an executor), nor yet by the common law; for that it requireth the administrator to pay legacies according to the ecclesiastical decision, and shall be taken to be obtained by coercion. On the contrary it was argued, that this not being on an intestacy (nor in case where executor refuseth) is not within the statute, it is true; but it is to be supported as a reasonable bond taken by the course of the ecclesiastical court. And though formerly it was disputed, yet it is now settled, that they may compel distribution: That here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: And if it be good in any part (being a bond at common law) it is enough. And it differs from the case, where part of the condition is against a statute, for there it is void *in toto*. And by the court, these administrations are not within the statutes. And therefore we deny a *mandamus*: We must therefore consider it as a bond at common law; and then it is sufficient if it be good in that part on which the breach is assigned; as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment. *Folkes and Doerniquet, 2 Stra. 1137. 2 Burn's Eccle. Law 641.*

CHAP. X.

Administrator durante minori ætate; His Power; Of repealing Administration; The Effect of it; Of Distribution.

Of Administrators durante minori ætate.

Servant to the infant.

How an action shall be brought by him.

HE is said to be but a servant or bailiff to the infant. *Dal.* 85. 3 *Leon.* 278. *Godh.* 104. *Ow.* 35.

W. E. brought debt by the name of *W. E. Administrator bonorum et catallorum A. E. durante minori ætate* of *J. E.* executor of the said *A. E.* executor of *R. Every*, upon an obligation made to *R. E.* the first testator. It was held, that by this administration he had no authority to meddle with the goods of the first testator. *Limmer v. Every, Cro. Eliz.* 211. 4 *Leon.* 58. *Norton*, executor of *James Hobart*, brought a writ of covenant against *Molineux* and *Ford* administrators of the goods of *Thomas Carrel*, during the minority of *Mary Molineux*, executrix of the said *Thomas Carrel*, late executor of *Edward Carrel*, upon a covenant of *Edward Carrel's* for payment of an annuity; issue *non est factum*, found for the plaintiff. It was moved in arrest of judgment, that the defendants should have been named administrators of the goods of *Edward* not administered by *Thomas*; but the court being informed that this was the ancient form, judgment was given for the plaintiff: If the children had been defendants they should have been named, but executors of the executor

Testaments, Last Wills, and Executors.

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for the rest follows, but the committing of administration is of both goods, but the precedents rule in the titling. *Norton v. Molineux*, *Hob.* 246. where upon *plene administravit* he may shew the delivery of the effects to the infant when he came of age. *Mod.* 174. *Hob.* 265. where if he continues in possession, he may be charged after the infant comes of age. *Sid.* 57. *Hob.* 266.

In an action of debt against an administrator, if the defendant pleads in bar a judgment against him by a stranger upon an obligation, and in the record he is named administrator *durante minori etate* J. S. who was then within the age of 21 years, viz. of the age of 18 years or more, this is a good bar of the action; for though the full age of such infant executor is sixteen, [9. seventeen] yet if an action be brought against the administrator after, and this age of the infant appears to be past, yet if judgment be given against the administrator, it is not void. *Good v. Pinsent*, *Roll. Ab.* 910. *L. p.* 1.

In an action against him he may plead a judgment obtained after the infant's age of 17.

If administration be granted to A. *durante minori etate* of B. and it appears to the court in pleading, that B. is of the age of sixteen [seventeen] the court *ex officio* ought to take notice of the ecclesiastical law, that the administration is determined and void. *Damport and Pinsent*, *Roll. Ab.* 910. *L. p.* 2. *Cro. Car.* 516. If an action be brought against an administrator *durante minori etate* of B. and pending the action B. comes of age, the defendant may plead this. *Ford and Glanville*, *Gouls.* 136. *sed Moor* 462. *p.* 648. *S. C. dubitatur*, *et Lutw.* 342. It is said to have been held, that although an action against an administrator *durante absentia*, &c. abates by the return of the executor, yet it is otherwise where an action is brought against an administrator *durante minori etate*.

Where he may plead that the infant is of age.

If one brings an action *durante minori etate* of A. and avers that A. is within the age of twenty-one, and the defendant pleads an insufficient bar,

In an action against him, averring that the infant is under 21, is bad.

to

to which the plaintiff demurs, he shall not have judgment, for the administration ceases at seventeen; and though he be under twenty-one, yet he may be seventeen or above. *Piggot and Gascoign*, 5 Co. 29. Adjudged upon a conference had with the doctors of the civil law. *Piggot and Gascoign*, 5 Co. 29. Cro. Eliz. 602. 5 Mod. 395. 2 Vent. 378. Brownl. 46.

Not averring he is under 17 no cause to arrest judgment after verdict.

If one brings an action *durante minori etate* of *A.* and the defendant pleads to issue, and it is found against him, he shall not afterwards arrest the judgment, because the plaintiff did not shew that *A.* was under seventeen; for when the defendant hath admitted him to bring the action, and pleaded to issue, it cannot be intended that *A.* was above seventeen. *Wells and Somes*, Cro. Car. 240. Yel. 128. Lut. 632. 2 Roll. Rep. 466. 2 Sid. 40, 60.

Need not aver the executor to be under 17.

If an action be brought against an administrator *durante minori etate* of an executor, the plaintiff need not aver the executor to be within the age of seventeen. *Carver and Haslerig*, Hob. 251. Croft and Walbank, Yel. 128. because the plaintiff is a stranger to the defendant's power, and cannot know the infant's age. *Haul and Salvin*, Roll. Rep. 400. Vide Vaugh. 93. 2 Sid. 60.

If the administrator be plaintiff he must.

But it is otherwise in an action brought by such an administrator. *Carver and Haslerig*, Hob. 251. *Walthal and Aldridge*, Cro. Jac. 590. 2 Roll. Rep. 186, 404, 409, 466. 2 Sid. 60. Yel. 128.

When the administration during the minority of divers, shall cease.

If administration be granted during the minority of three, and one dies or comes of age, whether the administration was determined was made a question, *Brudenel's case*, 5 Co. 9. but not determined. *Leon*. 74. 1 Brownl. 46, 47. Debt by an administrator *durante minori etate* of 4, for rent arrear since the death of the intestate, and sets out, that *Valentine* one of the four is of the age of 18 years; the defendant demurs. *Twisden*: The administration is determined. *Hale*: You set not out

out, whether the intestate, who made the lease, rendering rent, was possessed for a term of years, for if he was seised in fee, the administrator cannot sue for the rent incurring after the intestate's death, for it belongs to the heir. The plaintiff discontinued, yet this was a declaration perused by counsel of both sides; for the parties were agreed to put it in a way to have the opinion of the court, whether the administration was determined when one of the minors came of the age of seventeen. *Joyner and Watts, Ent. 27, 28 Car. 2. Rot. 1001. B. R. 3 Keb. 607, 643. 2 Jon. 40.* In *Easter* term, after the plaintiff having amended, it was argued, and adjudged, that the administration ceased when *Valentine* came of age, and the ordinary ought to commit administration to him; and the statute of distributions alters not the case, for his friends may become bound for him, though he cannot; *sed vide Salk. 39.* So where there is administration *durante minori ætate* of divers executors, he that comes first of age shall prove the will.

An administration *durante minori ætate* of an executor ceases at his age of 17. *Atkinson and Cornish, 5 Mod. 395. Com. 475.* for by the spiritual law he may be an executor at seventeen. 2 *Jon. 48. Salk. 39.*

During the minority of an executor at 17.

But an administration granted during the minority of one not made executor, does not cease till the party is of full age, 5 *Mod. 395.* Does not determine till the party, in whose right he acts, attains the age of twenty-one; for administrations are by the statute, and not grantable to any under twenty-one, who must give bond, &c. *Salk. 39. sed vide 2 Jon. 48.* and the case of *Joyner and Watts supra.*

Of any other not till 21.

If there be two executors, and one is under the age of seventeen years, administration during his minority may be granted to the other, so that he may bring an action alone. *Colborn and Wright, 2 Lev. 239. 2 Jones 119, 120. Lev. 181.*

If two executors, and one under 17, administration may be granted to the other.

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Smith

Smith and Smith, 1 Brownl. 101. Tel. 130. Tho' it was objected, that where there was an executor, the ordinary had no power to grant administration. *Vide Vent. 104. Mod. 47.*

When administration during the minority of a woman who afterwards marries, shall cease.

If administration is granted during the minority of a woman, and she takes a husband of age, the administration ceases, for that she hath a husband who may administer as executor. *Prince's case, 5 Co. 29. b.* Administration may be granted to him. *Vern. 25.*

The Power of such Administrator.

Whether he may sell the goods.

AN administrator *durante minori ætate* may sell the goods of the testator, and pay the debts, and do all things that an executor may. *Pasf. 42 Eliz. B. R. per Curiam, Roll. Ab. 910. M. p. 1.*

Whether he may have an action of trover.

An administrator *durante minori ætate* may have an action of *trover* and *conversion* of the goods of the testator, for he hath more than the custody of them, for he hath the property itself. *Pasf. 42 El. B. R. Sethe and Sethe, Roll. Ab. 910. M. p. 2.*

Where his release shall not be good.

If an administration *durante minori ætate* be repealed, and another administration *durante minori ætate* granted, and the second administrator brings the first administrator to account, and after releases him, yet the infant at full age may compel the first administrator to account to him again; and the first account to the second administrator, and his release shall not be any bar thereof; for the release of such administrator is not good unless it be for such cause as he ought to make it. *Mic. 10 Jac. B. per Curiam, Roll. Ab. 910. M. p. 3.*

In what cases he may sell goods.

An administrator *durante minori ætate* of an executor cannot sell any of the goods of the deceased, if not necessary for payment of his debts, or *bona peritura*, for he hath his office for the benefit of the infant, and not for his prejudice. He cannot assent to a legacy unless there be assets to pay

Or assent to a legacy.

pay debts, &c. and generally can do nothing to the prejudice of the infant. *Prince and Simpson*, 5 Co. 29. b. 2 *And*. 32. *Cro. Eliz.* 718, 719. b. Co. 67. And in this case the administration was granted specially *ad commodum & utilitatem* of the infant, & *non aliter*. *Vide March* 138. But if administration is granted generally *ratione minoris ætatis* without any restraint or limitation, such administrator may sue or be sued, for during the time the testator is dead *quasi* intestate. And such administrator may make leases, &c. though not necessary. *Finch's case*, 6 Co. 67. b.

Or sue or be sued,

Or make leases

Of Repealing the Administration.

IF an administration be well granted according to the statute, it cannot be repealed without just cause, as lunacy, &c. of which the court here will judge, and therefore the cause ought to be shewed particularly in the pleadings. *Price and Parker*, *Lev.* 157. *Sid.* 280.

Not without just cause.

It may be repealed without any sentence of revocation to be given in any spiritual court, or otherwise. *And.* 303. As by granting a new administration. *Ow.* 50. *Cro. Eliz.* 460. said by *Popham* in the case of *Watson and Packman*, *Salk.* 38. *sed vide Cro. Eliz.* 315. *Style* 10, 102. 1 *bid.* 409.

How repealed.

The Effect of repealing it.

IF administration be granted to a stranger, and after the next of kin sues a citation to repeal it, pending which suit the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sells the goods of the intestate, and after the administration is revoked by sentence, and administration granted to the next of kin, yet the sale is good against the second administrator. *Wil-*
son and Packman, 6 Co. 18. b. *Moor* 396. pl.

In what case upon administration repealed, all mesne acts shall remain good.

§17. *Cro. Eliz.* 459, 460. for the administration was good till repealed. *1 Mod.* 231. And a diversity was taken between this suit by citation to revoke former letters of administration, and an appeal which is always to reverse a former sentence, for the appeal suspends the former sentence; otherwise of a citation; but such a grant by *Covin* to defraud creditors, is void by the statute of 13 *Eliz.* Upon long pleadings the case was, *A.* was possessed of a term for years, and died intestate, and administration was granted to *B.* who surrenders to the lessor; After this a citation is sued in the same court by the plaintiff, and administration affirmed; the plaintiff appeals to the arches, where the sentence is repealed, and administration granted to the plaintiff. The question was, if the first administration be so repealed, that all mesne acts by the first administrator shall be avoided? And it was held clearly upon the first opening, that it was not; for the appeal is of the sentence of affirmation, which being repealed, the court ought to give such judgment as was to be given in the inferior court upon the citation; so the administration standing reversed as in the inferior court by citation only, all mesne acts are good. *Mich.* 15 *Car.* 2. *Sims and Sims*; *vide Raym.* 224. 1 *Lev.* 90. 3 *Keb.* 206.

When on a judgment by administrator, after letters repealed he shall not have execution.

If one as administrator obtain judgment upon a bond, and after his administration is revoked, he cannot after sue execution, for the administration being revoked, the power of the administrator is determined, and the ground of the suit overthrown. *Barnhurst and Yelverton*, *Yelv.* 83. *Noy* 15. *Brownl.* 91. *Cro. Eliz.* 283. Where the defendant in such case is to be relieved by *audita querela*, *vide* 1 *D. A.* 636. p. 19. 2 *Saund.* 149. *Lutw.* 343. An administrator recovers in trover, counting of his own possession; but before execution administration is revoked, and the defendant brings *audita querela*; and adjudged it lies; for tho' he bringing

it of his own possession need not name himself administrator, yet the damages recovered are assets. (So where baron and feme executrix recover, the feme dies before execution, the baron shall not have a *scire facias*. *Beaumont and Long*, Cro. Car. 208, 227. *Jon.* 248. *Cro. Car.* 464.) *Turner and Davis*, Ent. Pas. 22 Car. 2. ro. 576. *B. R.* vide 2 *Saund.* 148. *Mod.* 62. 2 *Keb.* 668.

Of Distribution of Intestates Estates.

BY the statute of 21 H. 8. upon granting administration the ordinary was to take security from him or them, to whom it was granted, for the true administration of the goods, chattels and debts of the intestate; but the ordinary could not impose any other or further condition in the bond, as after debts and legacies paid, to distribute the surplus as the court should direct; though the ordinary would pretend, that the true administration in the act mentioned was to be extended as well to the disposition of the surplus as payment of the debts. *Slawney's case*, Hob. 83. *Moor* 864. *Raym.* 498. 3 *Inst.* 150. 4 *Inst.* 336. 3 *Mod.* 58, 60. *Skin.* 219, 270.

The ordinary could not on the stat. 21 H. 8. take bond from the administrator to distribute.

The ordinary upon granting administration shall take bond from the person to whom committed, with two or more able sureties, according to the value of the estate, conditioned that the administrator shall make a true and perfect inventory of all the goods, chattels and debts of the deceased, and exhibit the same into the registry of, &c. before, &c. and such of them as shall come to his, or the hands and possession of any other person for him, shall truly administer according to law, and make a just and true account of his administration as or before, &c. and the rest of the goods, &c. which shall be found remaining upon the account, the same being first examined and allowed by the court, shall deliver and pay to such person as the judge by decree pursuant to

But by stat. 21, 22 Car. 2. shall take bond with sureties from the administrator for his true administering.

the intent of this act shall appoint: And if it after appears any will was made, and the executor therein named exhibits the same in court, requesting that it should be allowed and approved, and being so, the administrator being thereunto required, shall deliver up the said letters of administration in court, Stat. 22 & 23 Car. 2. stat. 2: c. 10. *see*, 1. Note this was a temporary act made only for seven years; but by 30 Car. 2. c. 6. was continued for seven years more, and by the 1 Jac. 2. c. 17. made perpetual.

The bond shall not be assigned to a creditor, &c.

to distribute
the advantages
of the bond (man)
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The condition of the bond, as to administering truly according to law, is to be intended in bringing in his account, and not in paying the debts of the intestate; and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be endless and infinite. 1 *Salk.* 316. 1 *Lutw.* 882, 884. *sed vide Vaugh.* 96.

How to account.

The administrator must account according to the condition of the bond without citation or suit, and this account must be in court; and if he comes at the day, and no court is held, he shall be excused. *Salk.* 316, 172.

Ordinary may call administrator to account, and order distribution.

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The ordinary may call such administrator to account, and order distribution of what remains, after debts, funerals, and just expences allowed according to the laws [the canon law, 2 John. 93. 2 Vern. 170.] in such cases used, and the rules after set down, saving to persons aggrieved their appeal. Stat. 22, 23 Car. 2. stat. 2. c. 10. sect. 3.

**Suit for distribu-
tion proper in
chancery.**

But 1 *Vern.* 134. It is said the ordinary hath but a lame jurisdiction, and there being no negative words in the act, a bill for distribution properly lies in the chancery. 2 *Vent.* 362. 2 *Ch. Ca.* 95. And indeed where the surplus of the personal estate for want of disposition by the will is distributable, there can be no suit for it in the spiritual court, 5 *Mod.* 247. having no authority

When it must be there.

to compel a distribution when a will is made.

Fitzg. 126.

In making distribution before this statute, the ecclesiastical courts always observed two rules.

1. *Representatio in filiis fratrum et sororum tantum locum habet, ad ultiores vero collaterales non extenditur.* 2. Where there are no brothers or sisters children, *vocantur ad successionem reliqui collaterales, quicumq; in gradu sint proximiores, remotioribus exclusis.*

Raym. 506. So certified by several of the doctors.

Saving the customs of London, provinces of York, and other places, having known and received customs.

Same Stat. §. 4.

As to a freeman of London's testamentary part, if the freeman does not dispose of it by will, it is liable to a distribution within the act. *Vide Percival and Crisp, 2 Jon.* 204. *Skin.* 26, 41. *Vern.* 134, 305, 314, 315, 432, 465. 2 *Vern.* 274. And by the statute of 1 *Jac.* 2. c. 17. for determining some doubts arisen, it is declared that this clause was never intended, nor shall be taken to extend to such part of the intestate's estate, as any administrator, by virtue only of being administrator, by pretence or reason of any custom may claim to have been exempted from distribution, but such part in the hands of such administrator shall be subject to distribution as in other cases.

The surplusage [after debts, funerals, and just expences allowed] shall be distributed as follows, viz. One third to the wife of the intestate, the rest by equal portions amongst the children of the intestate and such as legally represent them, if any of them be dead, other than such child or children (not being heir) who shall have any estate by settlement of the intestate, or be advanced by him in his life-time by portions equal to the shares of the other children; and in case any child, other than the heir at law, shall have had an estate by settlement from the intestate, or be by him advanced in his life-time

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How the intestate's estate is to be distributed, if there be a wife and children.

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by portion not equal to the shares of the others, he shall have so much as will make the estate of all equal as near as can be estimated; but the heir shall have an equal part without consideration of the value of the lands which he hath by descent or otherwise from the intestate. Same Stat. §. 5.

Whether an estate *pur auter vie* is distributable.

Though an estate *pur auter vie*, for want of a special occupant, shall by stat. 29 Car. 2. c. 3. go to the executors and administrators, and is by the said statute made assets for payment of debts, yet it is not by this act to be distributed. *Oldam and Pickering, Carthew* 376. And it was said that the estate was not changed, but remained a freehold which the ecclesiastical court had nothing to do with. *Comb.* 388, 389. adjudged; though *Cheshire*, who argued for the prohibition against his own opinion and that of Mr. *Finch*, wondered the court gave judgment so suddenly; and there is a note by the reporter, that probably such estate would be distributable in *Chancery*. *Salk.* 464.

When, if a man makes a will and does not dispose of his whole estate, the surplus shall be distributed.

Where an express legacy is given to an executor for his care, and there is no disposition of the surplus, the executor, as to that, is but a trustee, and it must be divided as if the testator had died intestate. *Vern.* 473. 2 *Vern.* 140, 361, 648, 649, 675, 676. *et vide* 5 *Mod.* 274. So if the executor dies before probate, and there is no disposition of the surplus. 2 *Vern.* 634. 2 *Mod.* 101.

What shall be brought into hotchpot.

A. on his marriage with the daughter of *B.* covenanted, in case of a second marriage, to pay the first son by the first wife 500*l.* *A.* died intestate, leaving a son and several other children. It was held, that the son should bring the 500*l.* into hotchpot, although he was in the nature of a purchaser under a marriage-settlement. *Phiney and Phiney*, 2 *Vern.* 638, 639. *vide* 2 *Vern.* 274. *Fitzgibbon* 285, 286.

Thomas

Thomas Lutwyche, Esq; died intestate possessed of a personal estate, and seised of a copyhold in fee of the nature of *Borough English*.

Lands descended to the youngest son as heir by the custom of *Borough English*, shall not be brought into hotchpot.

In chancery the question was upon the statute 22, 23 Car. 2. c. 10. §. 5. of distributing intestates estates, whether the youngest son should have an equal share with the other children of the personal estate exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children?

It was decreed, that an account should be taken of the personal estate, and that the youngest son should have an equal share without regard to the value of the *Borough English* estate. *Lutwyche and Lutwyche, Pas. 1735. Forester's Reports 276.* The like determination soon after. *Prat and Prat, Fitzgib. 284.*

But if there be no children, or legal representatives of them, the wife shall have a moiety, and the rest shall be distributed equally to the next of kin of the intestate in equal degree, and their representatives. Same Statute, §. 6.

How to be distributed if only a widow, and no children.

A man died intestate, leaving a brother of the whole blood, and a sister of the half blood. It was held, that the sister of the half blood should come in for an equal share with the brother of the whole blood. *Smith and Tracy, Vent. 307, 316, 323. 2 Vent. 317. 2 Lev. 173. 2 Jon. 93. Mod. 209. 2 Mod. 204. 3 Keb. 669, 601, 620, 730, 776, 806, 831. Brown and Brown, Comb. 112. Carth. 51, 52.* And where it hath been said in some books that one of the half blood should not have a full share, but only a moiety, it hath been exploded as a fancy. *Show. 1, 2. Crook and Watts. Show. P. C. 108. 2 Vent. 317. 2 Vern. 124, 170. 1 Vern. 404, 424, 437. 2 Show. 285, 286.*

The half blood takes equal with the whole blood.

A man having a son and two daughters, one of the daughters died, and the father intending to let his

his son have the whole advantage, renounced the administration, and it was granted to the son, and the sister after sued for a distribution, though objected that she was not intitled at the death of the intestate. *Skin. 103.*

Grand-mother
intitled before
uncles and aunts.

If one dies intestate, leaving a grand-mother and uncles and aunts, the grand-mother is intitled to the personal estate in exclusion of the uncles and aunts. *Trin. 1719. Woodroffe and Winkworth, Prec. Ch. 527. Salk. 251.*

Where no representation.

Provided no representations shall be admitted amongst collaterals after brothers and sisters children—

How if no wife.

And in case there shall be no wife, all shall be distributed equally amongst the children—

How if neither
wife nor child.

And if no child, then to the next of kin in equal degree. Same Statute, §. 7.

No representation amongst collaterals after the children of the brothers and sisters of the intestate.

A question was on the first part of this clause, that there should be no representations amongst collaterals after brothers and sisters children, whether to be intended of brothers and sisters to the intestate; or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation should be admitted? And the court held, that the representation should be only between the brothers and sisters to the intestate. *Maw and Harding, 2 Vern. 233, 168. Vern. 169, 233. Salk. 250. Raym. 496.*

Where brothers
children take as
next of kin, and
not by way of
representation,
they shall take
per capita & non
per stirpes.

A. had three brothers, one died leaving three children, another died leaving two, and the third died leaving five children, then A. died intestate. It was resolved that distribution should be per capita, et non per Stirpes, and that all the children, should have equal; because none take by way of representation, but all as next of kin. Mich. 1695. Walsh and Walsh, Prec. Ch. 54.

How if but one
child and no
widow.

If the intestate leaves but one child, and no widow, such child shall have the whole, though it was argued, that the word *distribute* implied more than

than one. *Palmer and Allicock*, Skin. 212, 218.
3 *Mod.* 58. 2 *Show.* 407, 486. *Comb.* 14, 16,
112.

And to the end that due regard be given to creditors, no distribution shall be made till after one year after the intestate's death; and every one to whom any share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debts owing by the intestate shall be after sued for and recovered, or otherwise made appear, he shall refund and pay back to the administrator his rateable part of such debts and costs of suit, and charges of the administrator by reason thereof, to pay debts so recovered after distribution. Same Statute, §. 8.

No distribution till after a year.

Security to refund in case of debts.

Yet the party intitled hath such an interest in his share, that although he dies within the year, his executors or administrators shall have it. *Brown and Brown*, *Comb.* 112. *Carth.* 51, 52. *Show.* 225. *Vern.* 124, 126. *Palmer and Allicock*, 3 *Mod.* 59. *Comb.* 14, 16, 2 *Vern.* 274.

Though the party dies within the year, his executor shall have his share.

In all cases where the ordinary used to grant administration cum testamento annexo, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed as it should if this act had not been made. Same Statute, §. 9.

Ordinary to grant administration cum testamento annexo as usual.

The act of 22 & 23 *Car.* 2. shall not be construed to extend to the estates of feme coverts who die intestate; but their husbands may demand and have administration of their rights, &c. and recover and enjoy the same as before the making the said act. *Stat.* 29 *Car.* 2. c. 3. §. 25. Whether the law was not so before, *vide* 2 *Mod.* 20, 21.

Stat. of distribution not to extend to estates of feme coverts who die intestate.

If after the death of the father any of his children die intestate without wife or children, in the life of the mother, every brother and sister, and the representatives of them, shall have an equal share with her. *Stat.* 1 *Jac.* 2. c. 17. §. 7.

Where the mother shall come in equally with brothers and sisters.

James Wallis died intestate, leaving a wife *en-*
sient with a daughter, and one son *Towers Wallis*;

Towers

Posthumous child intitled to a share of a bro-

ther's personal
estate equally
with the mo-
ther.

Towers Wallis died after his father, and then the mother was delivered of a daughter named *Elizabeth*: A bill was brought by the daughter for a moiety of the personal estate of *Towers Wallis*, the mother insisting on the whole. It was held, that the daughter was intitled to a moiety of the personal estate of her brother *Towers Wallis*, notwithstanding she was born after his death. Vide the Stat.

1 Jac. 2. c. 17. sect. 2. Barn. Rep. fo. 272. 2 Aik. Rep. 115. 2 Burn's Eccle. Law 731.

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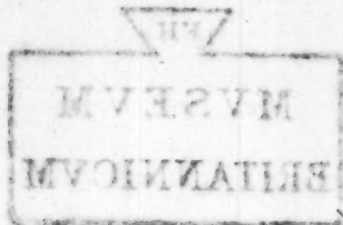
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